

# Missouri Law Review

---

Volume 62  
Issue 3 *Summer 1997*

Article 2

---

Summer 1997

## Regulating Expert Testimony

Douglas R. Richmond

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Douglas R. Richmond, *Regulating Expert Testimony*, 62 MO. L. REV. (1997)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol62/iss3/2>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# Regulating Expert Testimony

*Douglas R. Richmond\**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	486
II.	EXPERT TESTIMONY UNDER THE FEDERAL RULES OF EVIDENCE ...	491
	<i>A. Federal Rule of Evidence 104(a)</i> .....	492
	<i>B. Federal Rule of Evidence 702</i> .....	493
	<i>C. Federal Rules of Evidence 703 and 705</i> .....	510
	<i>D. The Overlap Between Rules 702 and 703</i> .....	518
	<i>E. Federal Rule of Evidence 403</i> .....	520
	<i>F. Federal Rule of Evidence 704</i> .....	527
	<i>G. Parting Thoughts</i> .....	532
III.	EXPERT TESTIMONY AND THE FEDERAL RULES OF CIVIL PROCEDURE	533
	<i>A. An Overview of the Rule 26 Disclosure Requirements         and Their Effect</i> .....	535
	1. Rule 701 v. Rule 702 Opinions .....	535
	2. Disclosing Treating Physicians' Opinions .....	538
	3. Rebuttal v. Impeachment Testimony .....	539
	4. The Disclosure and Discovery of "Consulting Experts" .	541
	5. The Work-Product Doctrine and Communications Between Attorneys and Expert Witnesses .....	543
	<i>B. Enforcing Expert Disclosure: Rule 37</i> .....	551
IV.	EXPERT WITNESSES AND CONFLICTS OF INTEREST .....	557
V.	EXPERT WITNESS FEES .....	566

## VI. CONCLUSION ..... 571

## I. INTRODUCTION

It is undisputed that expert testimony is a significant factor in modern litigation. Many cases—especially those involving complex issues of causation—often boil down to a “battle of the experts.” As the Supreme Court of Missouri once observed, expert witnesses “play as great a role in the organization and shaping and evaluation of their client’s case as do the lawyers.”<sup>1</sup> Products liability litigation typically requires testimony by engineers, personal injury cases require expert medical testimony, and economists and accountants are asked to value damages in a wide variety of disputes. A number of disciplines or professions now include forensic specialties. Expert testimony is “big business.”<sup>2</sup>

Many experienced trial lawyers might reasonably ask, “so what?” Our adversary system certainly permits parties to do all that they ethically can to advance their positions. Employing expert witnesses who will offer favorable opinion testimony is but one form of zealous advocacy. Almost all litigants have nearly unlimited access to a wide variety of experts, and opposing experts are always subject to cross-examination.

This pragmatic approach to expert testimony, appealing though it may be, ignores the judicial perspective and overlooks broader evidentiary concerns. First, expert testimony which borders on the fantastic, or which is wholly incredible, undermines the integrity of the adversary system.<sup>3</sup> Second, an expert witness should not be a party’s advocate. Experts should not be the litigation equivalent of hired guns. Rather, as the *Selvidge v. United States*<sup>4</sup> court observed: “An expert witness should be an advocate of the truth with testimony to help the court and the jury reach the ultimate truth in a case, which should be the basis of any verdict.”<sup>5</sup> If this view is naive,<sup>6</sup> it nonetheless represents the

---

\* Partner, Armstrong Teasdale Schlafly & Davis, Kansas City, Missouri. B.S., Fort Hays State University; M. Ed., University of Nebraska; J.D., University of Kansas.

1. *Murphy v. A.A. Mathews*, 841 S.W.2d 671, 682 (Mo. 1992).

2. Kathy J. Cook, *Reviving the Dying Spirit of Rule 704: Putting the Legal Conclusion Doctrine to Rest*, 62 DEF. COUNS. J. 564, 564 (1995) (noting that the largest expert referral service in the United States lists “22,500 experts willing to testify on some 5,500 subjects, including ear print identification, unidentified flying objects and wigs”); see also *Cordy v. Sherwin-Williams Co.*, 156 F.R.D. 575, 582 (D.N.J. 1994) (“The business of being an expert has become a cottage industry.”).

3. See *Johnston v. United States*, 597 F. Supp. 374, 410-15 (D. Kan. 1984).

4. 160 F.R.D. 153 (D. Kan. 1995).

5. *Id.* at 156 (citing *Van Blargan v. Williams Hospitality Corp.*, 754 F. Supp. 246,

prevailing federal perspective.<sup>7</sup> Third, expert witnesses merit special attention because their testimony can be powerful and simultaneously very “misleading because of the difficulty in evaluating it.”<sup>8</sup> Absent judicial guidance, jurors may “abdicate their fact-finding obligations” and, instead, simply adopt the opinions of the expert witnesses whose testimony they find persuasive.<sup>9</sup>

Expert testimony often becomes a point of contention in cases in which an expert witness is alleged to be a “professional expert.” Professional experts usually are compelling witnesses whose primary function is persuading the jury; the expert’s demeanor, personality and communications skills are far more important than the subject of the expert’s testimony. Professional expert witnesses freely change their theories and qualifications to suit their immediate employers.<sup>10</sup> For example, an industrial engineer testifying for a plaintiff in a products liability case might claim to have specialized training in “human factors,” thus allowing him to opine about the adequacy of the manufacturer’s warnings. In another products liability case that same industrial engineer might claim to have extensive experience or education in mechanical engineering, thus permitting him to testify that a machine was defectively designed. Professional

248 (D.P.R. 1991)); *see also* Tyus v. Urban Search Mgmt., 102 F.3d 256, 263 (7th Cir. 1996) (in all cases a district court “must ensure that it is dealing with an expert, not just a hired gun”), *cert. denied*, No. 96-1558, 1997 WL 155485 (June 2, 1997); English Feedlot, Inc. v. Norden Labs., Inc., 833 F. Supp. 1498, 1501 (D. Colo. 1993) (“Experts are not advocates in the litigation but are sources of information and opinions.”); Van Blargan v. Williams Hospitality Corp., 754 F. Supp. 246, 249 (D.P.R. 1991) (“An expert witness should never become solely one party’s expert advocate nor a ‘gun for hire.’ Rather, an expert witness should be an advocate of the truth with testimony to help the jury and the Court reach the ultimate truth . . . which is the basis of any verdict.”).

6. *See* PETER W. HUBER, *GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM* 18 (1991) (“I would go into a lawsuit with an objective uncommitted independent expert . . . about as willingly as I would occupy a foxhole with a couple of noncombatant soldiers.”) (quoting a former American Bar Association president). The late Melvin Belli once observed: “If I got myself an impartial expert witness, I’d think I was wasting my money.” *Id.*

7. *See, e.g.,* Kirk v. Raymark Indus., Inc., 61 F.3d 147, 163-64 (3d Cir. 1995) (holding that expert testimony for same party in different case cannot constitute an admission by that party because expert witnesses are independent, and their testimony is not subject to their clients’ control), *cert. denied*, 116 S. Ct. 1015 (1996).

8. Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991).

9. Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” Under the Federal Rules of Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537, 541 (1994).

10. *See* Tokio Marine & Fire Ins. Co. v. Grove Mfg. Co., 958 F.2d 1169, 1174-75 (1st Cir. 1992) (engineering expert testified in 18 dissimilar fields).

experts' testimony tends to mislead juries, prolong litigation and unnecessarily increase litigation expense.

Novel scientific testimony sprouts like weeds. Some scientific testimony borders on the absurd. A college anthropology professor who appeared as an expert witness in more than twenty criminal cases in eleven states and Canada claimed to be able to match a footprint on any surface to the person who made it.<sup>11</sup> Her claims were later debunked, with one observer describing them as "complete hogwash."<sup>12</sup> A forensic dentist from Mississippi, Dr. Michael H. West, claims to be able to match human bite marks with the teeth that made them through the use of ultraviolet light.<sup>13</sup> The problem with Dr. West's ostensibly plausible technique is that he "sees things under [ultraviolet light] that he cannot document and that nobody else can see."<sup>14</sup>

Far more mainstream areas than footprint matching and the forensic use of "blue light" regularly challenge courts and juries. Perhaps the hottest scientific evidence topic is psychological syndrome evidence.<sup>15</sup> A "syndrome" is a "set of symptoms which occur together."<sup>16</sup> Unlike diseases, syndromes follow no specified temporal course, nor is their pathology clear, making them common litigation topics. Many psychological syndromes have become the continuing subject of expert testimony. These include child sexual abuse accommodation

---

11. Mark Hansen, *Believe It or Not*, A.B.A. J., June 1993, at 64, 64.

12. *Id.*

13. Mark Hansen, *Out of the Blue*, A.B.A. J., Feb. 1996, at 50, 51.

14. *Id.*

15. See generally Krista L. Duncan, Note, "Lies, Damned Lies, and Statistics"? *Psychological Syndrome Evidence After Daubert*, 71 IND. L.J. 753 (1996); James T. Richardson et al., *The Problems of Applying Daubert to Psychological Syndrome Evidence*, JUDICATURE, July-August 1995, at 10; John E. B. Myers, *Expert Testimony Describing Psychological Syndromes*, 24 PAC. L.J. 1449 (1993); Charles Bleil, *Evidence of Syndromes: No Need for a "Better Mousetrap"*, 32 S. TEX. L.J. 37 (1990).

16. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1629 (27th ed. 1988).

syndrome,<sup>17</sup> rape trauma syndrome,<sup>18</sup> battered woman syndrome,<sup>19</sup> post traumatic stress disorder,<sup>20</sup> parental alienation syndrome,<sup>21</sup> and false memory syndrome.<sup>22</sup>

17. Child sexual abuse accommodation syndrome, or CSAAS, describes five characteristics commonly observed in sexually abused children: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted and unconvincing disclosure of abuse; and (5) retraction of abuse claims. John E. B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 66-67 (1989). CSAAS does not detect sexual abuse; rather, it assumes the existence of abuse and explains the child's reactions. See *id.* at 67. The syndrome is described—and has been hotly contested—in a number of cases. See, e.g., *Gier v. Educational Serv. Unit No. 16*, 845 F. Supp. 1342 (D. Neb. 1994), *aff'd*, 66 F.3d 940 (8th Cir. 1995); *People v. Patino*, 32 Cal. Rptr. 2d 345 (Ct. App. 1994); *Steward v. State*, 652 N.E.2d 490 (Ind. 1995); *Hellstrom v. Commonwealth*, 825 S.W.2d 612 (Ky. 1992); *State v. Foret*, 628 So. 2d 1116 (La. 1993); *People v. Peterson*, 537 N.W.2d 857 (Mich. 1995); *State v. J.Q.*, 617 A.2d 1196 (N.J. 1993); *Kahre v. Kahre*, 916 P.2d 1355, 1363-64 (Okla. 1995); *State v. Ballard*, 855 S.W.2d 557, 561-63 (Tenn. 1993); *Frenzel v. State*, 849 P.2d 741 (Wyo. 1993).

18. See, e.g., *State v. Ali*, 660 A.2d 337, 349-52 (Conn. 1995); *State v. Alberico*, 861 P.2d 192 (N.M. 1993); *People v. Taylor*, 552 N.E.2d 131 (N.Y. 1990); see also *Duncan*, *supra* note 15, at 759-63; Jennifer J. Hackman, Comment, *Henson v. State: Rape Trauma Syndrome Used by the Defendant as Well as the Victim*, 19 AM. J. TRIAL ADVOC. 453 (1995).

19. See generally *Bleil*, *supra* note 15, at 48-51; *Duncan* *supra* note 15, at 763-67. Cases discussing battered woman syndrome include *United States v. Brown*, 891 F. Supp. 1501, 1506-08 (D. Kan. 1995) (expert testimony allowed), *State v. Hennum*, 441 N.W.2d 793, 798-99 (Minn. 1989) (expert testimony allowed with restrictions), *State v. Thomas*, 423 N.E.2d 137, 139-40 (Ohio 1981) (expert testimony excluded), and *State v. Riker*, 869 P.2d 43, 47-50 (Wash. 1994) (testimony admissible only in certain circumstances).

20. See generally *Duncan*, *supra* note 15, at 757-59. Several syndromes, such as rape trauma syndrome, are in fact subcategories of post traumatic stress disorder (PTSD). See Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, LAW & CONTEMP. PROBS., Autumn 1989, at 133, 155; *Duncan*, *supra* note 15, at 761. For a case discussing the overlap between PTSD and rape trauma syndrome, and essentially using the terms interchangeably, see *Hutton v. State*, 663 A.2d 1289 (Md. 1995).

21. See, e.g., *Wiederholt v. Fischer*, 485 N.W.2d 442 (Wis. Ct. App.), *review denied*, 491 N.W.2d 767 (Wis. 1992). "Parental alienation syndrome" may involve (1) one parent actively brainwashing or manipulating the child's feelings toward the other parent; (2) one parent unconsciously rewarding a child for turning his or her affection away from the other parent; (3) children alienating themselves based on a fear of a loss of love; or (4) children alienating themselves because of certain "situational factors." *Id.* at 444 n.1.

22. "False memory syndrome" refers to a condition in which the victim's personality or identity and personal relationships revolve around a traumatic memory which is objectively false, but in which the person strongly believes. False memory

Expert testimony on psychological syndromes presents special problems for courts evaluating its admissibility because (1) it embraces vague profiles and symptoms; (2) courts have no way of verifying experts' conclusions; (3) experts' evaluations of syndrome sufferers are essentially an art form; and (4) cross-examination is of questionable value when it comes to exposing unreliable elements in challenged experts' theories.<sup>23</sup>

Courts have not stood still in the face of what appears to be an expert witness explosion. The Supreme Court formulated detailed guidelines for the admission of scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>24</sup> The 1993 amendments to the Federal Rules of Civil Procedure expanded parties' disclosure requirements concerning expert witnesses, theoretically enhancing parties' ability to prepare for and combat opposing experts.<sup>25</sup> Even so, the admissibility of expert testimony and the control or regulation of expert

syndrome is linked to "repressed memories" and "recovered memories" of alleged childhood sexual abuse.

Cases discussing repressed and recovered memories of childhood sexual abuse include *Hoult v. Hoult*, 57 F.3d 1 (1st Cir. 1995), *Shahzade v. Gregory*, 923 F. Supp. 286 (D. Mass. 1996), *Borawick v. Shay*, 842 F. Supp. 1501 (D. Conn. 1994), *aff'd*, 68 F.3d 597 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1869 (1996), *Isely v. Capuchin Province*, 877 F. Supp. 1055 (E.D. Mich. 1995), *State v. Hungerford*, Nos. 94-S-045 to 94-S-047, 93-S-1734 to 93-S-1936, 1995 WL 378571 (N.H. Super. Ct. May 23, 1995), and *S.V. v. R.V.*, 933 S.W.2d 1, 8-20 (Tex. 1996).

There is also abundant literature on this topic. See, e.g., Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549 (1996); Jacqueline Hough, Note, *Recovered Memories of Childhood Sexual Abuse: Applying the Daubert Standard in State Courts*, 69 S. CAL. L. REV. 855 (1996); Douglas R. Richmond, *Bad Science: Repressed and Recovered Memories of Childhood Sexual Abuse*, 44 KAN. L. REV. 517 (1996); Emily E. Smith-Lee, Note, *Recovered Memories of Childhood Abuse: Should Long-Buried Memories Be Admissible Testimony?*, 37 B.C. L. REV. 591 (1996); Rola J. Yamini, Note, *Repressed and Recovered Memories of Child Sexual Abuse: The Accused as "Direct Victim,"* 47 HASTINGS L.J. 551 (1996); Joy Lazo, Comment, *True or False: Expert Testimony on Repressed Memory*, 28 LOY. L.A. L. REV. 1345 (1995); Julie M. Kosmond Murray, *Repression, Memory and Suggestibility: A Call for Limitations on the Admissibility of Repressed Memory Testimony in Sexual Abuse Trials*, 66 U. COLO. L. REV. 477 (1995); Christina Bannon, Comment, *Recovered Memories of Childhood Sexual Abuse: Should the Courts Get Involved When Mental Health Professionals Disagree?*, 26 ARIZ. ST. L.J. 835 (1994); Monica L. Hayes, Note, *The Necessity of Memory Experts for the Defense in Prosecutions for Child Sexual Abuse Based Upon Repressed Memories*, 32 AM. CRIM. L. REV. 69 (1994).

23. See *State v. Cressey*, 628 A.2d 696, 700-01 (N.H. 1993).

24. 509 U.S. 579 (1993).

25. See generally Gregory P. Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97 (1996).

witnesses remain troublesome issues. Courts have not analytically shifted far from where they were before *Daubert*; expert testimony is still liberally admitted. Judges may lack the scientific understanding necessary to accurately evaluate many forms of expert testimony. Some behavioral and social science principles may not lend themselves to *Daubert*-type inquiry. The 1993 amendments to the Federal Rules of Civil Procedure have “spawned several novel and nettlesome questions.”<sup>26</sup> “Professional expert” witnesses cannot always be identified. Additionally, relatively new expert issues—such as conflicts of interest—are becoming increasingly important.

This Article attempts a broad examination of modern expert witness practice, and judicial efforts to regulate or control expert testimony. Its foundation is the Federal Rules of Evidence and the Federal Rules of Civil Procedure; the Federal Rules are a valuable standard, and many states have adopted them in some form. Part I examines expert testimony under the Rules of Evidence, while Part II analyzes the expert disclosure requirements imposed by the Rules of Civil Procedure. Part III discusses conflicts of interest. Finally, Part IV examines limitations on the fees expert witnesses may charge.

## II. EXPERT TESTIMONY UNDER THE FEDERAL RULES OF EVIDENCE

Federal courts once required expert testimony if the subject matter was “beyond the ken” of ordinary jurors. The “beyond the ken” standard called for specialized knowledge to resolve problems with which lay people are unaccustomed to dealing.<sup>27</sup> Expert testimony could not be so complex or novel, however, that it was not generally accepted in the subject scientific or professional community.<sup>28</sup> Now, expert testimony in federal courts must be admissible under the Federal Rules of Evidence.<sup>29</sup> Six closely intertwined rules govern the testimony of expert witnesses: Rule 104(a), Rule 702, Rule 703, Rule 705, Rule 403 and Rule 704.<sup>30</sup> These rules offer an integrated approach to regulating expert testimony.

---

26. *Id.* at 97.

27. *See United States v. Porter*, 9 F.2d 153, 161 (E.D. Mich. 1925).

28. *See Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

29. The Federal Rules of Evidence significantly expanded the admissibility of expert testimony by eliminating common law restrictions. Faust F. Rossi, *The Federal Rules of Evidence—Past, Present, and Future: A Twenty-Year Perspective*, 28 LOY. L.A. L. REV. 1271, 1271 (1995).

30. These rules are listed in the order in which this Article discusses them, and as they are logically ordered for judicial consideration.



### A. Federal Rule of Evidence 104(a)

The admissibility of evidence often turns on the answer to a preliminary fact question. Does a witness have personal knowledge of a matter? Is a document authentic? Was a declarant's statement made under the stress of excitement caused by the event at issue? Does a document qualify as a business record? Rule 104(a) assigns to trial judges the responsibility for resolving preliminary questions of admissibility.<sup>31</sup> Rule 104(a) provides:

Preliminary questions concerning the qualification of a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . In making its determination [the court] is not bound by the rules of evidence except those with respect to privilege.<sup>32</sup>

Trial courts must make preliminary determinations concerning expert witnesses' qualifications and the admission of expert testimony generally.<sup>33</sup> Before admitting expert testimony, the trial court must conclude that the proposed testimony (1) constitutes scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.<sup>34</sup> These preliminary determinations are intended to ensure the reliability and the relevance of the expert testimony.<sup>35</sup> A trial court need not make its Rule 104(a) determination on the record; appellate courts assume that district courts perform such analyses *sub silentio*.<sup>36</sup>

Rule 104(a) requires a party wishing to challenge expert testimony to do so prior to its admission. Most courts prefer such challenges to be made well before trial, with motions in limine the preferred means.<sup>37</sup> A trial court's failure to preliminarily assess expert testimony is reversible error;<sup>38</sup> however, the standard of review does not favor the challenging party. A trial court's failure to fulfill

---

31. *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1077 (5th Cir. 1996); *Haggerty v. Upjohn Co.*, 950 F. Supp. 1160, 1162 (S.D. Fla. 1996).

32. FED. R. EVID. 104(a).

33. *Smelser v. Norfolk S. Ry.*, 105 F.3d 299, 303 (6th Cir. 1997); *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 781 (3d Cir. 1996); *Dickerson v. Cushman, Inc.*, 909 F. Supp. 1467, 1472 (M.D. Ala. 1995).

34. *United States v. Hall*, 93 F.3d 1337, 1341 (7th Cir. 1996) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993)); *Pioneer Hi-Bred Int'l v. Holden Found. Seeds, Inc.*, 35 F.3d 1226, 1230 (8th Cir. 1994) (quoting *Daubert*, 509 U.S. at 592).

35. *United States v. Velasquez*, 64 F.3d 844, 849 (3d Cir. 1995).

36. *Hoult v. Hoult*, 57 F.3d 1, 5 (1st Cir. 1995).

37. *See, e.g., Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 596 (9th Cir. 1996).

38. *See, e.g., Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638, 643 (7th Cir. 1995).

its Rule 104(a) obligation with respect to expert testimony is reviewed only for "clear error" or "plain error" affecting the parties' substantial rights.<sup>39</sup>

### *B. Federal Rule of Evidence 702*

Rule 702 is the critical evidentiary base for all expert testimony. Rule 702 mandates qualified expert witnesses while broadly stating those circumstances in which their testimony is admissible: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."<sup>40</sup> Helpfulness to the trier of fact is generally regarded as the touchstone of admissibility under Rule 702.<sup>41</sup> Expert testimony is presumptively helpful unless it concerns matters within lay jurors' everyday knowledge and experience.<sup>42</sup> Expert testimony is properly excluded "when it is not needed to clarify facts and issues of common understanding which jurors are able to comprehend for themselves."<sup>43</sup> After all, a witness "who knows no more than the average person is not an expert."<sup>44</sup>

Whether a witness is qualified to testify as an expert is a matter committed to the trial court's discretion.<sup>45</sup> Before admitting expert testimony, a district

39. *Cook v. American S.S. Co.*, 53 F.3d 733, 738 (6th Cir. 1995) ("clear error"); *Quinton v. Farmland Indus., Inc.*, 928 F.2d 335, 337 (10th Cir. 1991) ("plain error").

40. FED. R. EVID. 702.

41. *Hardin v. Ski Venture, Inc.*, 50 F.3d 1291, 1296 (4th Cir. 1995); *Thompson v. State Farm Fire & Cas. Co.*, 34 F.3d 932, 941 (10th Cir. 1994) (quoting *Werth v. Makita Elec. Works, Ltd.*, 950 F.2d 643, 648 (10th Cir. 1991)). One court has taken a slightly different view, concluding that the touchstone of admissibility under Rule 702 is "reliability," rather than helpfulness. *United States v. Rouse*, 100 F.3d 560, 567 (8th Cir. 1996).

42. *Kopf v. Skyrn*, 993 F.2d 374, 377 (4th Cir. 1993).

43. *Hibiscus Assocs. v. Board of Trustees*, 50 F.3d 908, 917 (11th Cir. 1995); *see also CMI-Trading, Inc. v. Quantum Air, Inc.*, 98 F.3d 887, 890 (6th Cir. 1996) (jurors competent to determine contracting parties' intent; expert testimony unnecessary); *Roback v. V.I.P. Transp. Inc.*, 90 F.3d 1207, 1215 (7th Cir. 1996) ("any juror" could understand subject without expert assistance); *London v. MAC Corp.*, 44 F.3d 316, 318 (5th Cir. 1995) (expert subject was "common knowledge"), *cert. denied*, 116 S. Ct. 99 (1995); *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 842 (9th Cir. 1995); *Justice v. Carter*, 972 F.2d 951, 956-57 (8th Cir. 1992); *Persinger v. Norfolk & W. Ry.*, 920 F.2d 1185, 1188 (4th Cir. 1990).

44. *Mercado v. Ahmed*, 974 F.2d 863, 870 (7th Cir. 1992).

45. *Huval v. Offshore Pipelines, Inc.*, 86 F.3d 454, 457 (5th Cir. 1996) (quoting *Banks v. McGougan*, 717 F.2d 186, 190 (5th Cir. 1983)); *McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 357 n.8 (9th Cir. 1996). Whether an expert is qualified to so testify

court should assure itself "that the expert knows whereof he speaks."<sup>46</sup> Expert witnesses may be precluded from testifying on subjects beyond their area of expertise even where the subjects fall within their general professional practice area.<sup>47</sup> If a proposed expert witness lacks specialized education or training, general experience in the subject field may not be sufficient qualification. Years of experience in a subject area alone will not automatically qualify a person as an expert on that subject.<sup>48</sup> By the same token, satisfactory academic or

---

necessarily depends on the facts of the particular case and on the expert's credentials or qualifications. It is impossible to predict the outcome of related judicial inquiries; however, there are a number of cases addressing expert witnesses' qualifications. *See, e.g.,* *Bogosian v. Mercedes-Benz, Inc.*, 104 F.3d 472, 476-77 (1st Cir. 1997) (certified master mechanic not qualified to opine about automobile transmission design defect); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 382-83 (5th Cir. 1996) (ecologist whose expertise was limited to rats and their exposures to toxins was not qualified to testify about toxic effects of chemicals on humans); *Suitum v. Tahoe Reg. Planning Agency*, 80 F.3d 359, 363 (9th Cir.) (land use planner not qualified to value property because he was not an appraiser, notwithstanding familiarity with project), *cert. granted*, 117 S. Ct. 293 (1996); *London v. MAC Corp.*, 44 F.3d 316, 318 (5th Cir. 1995) (witness not qualified to testify about machine's operation because he was not an engineer); *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317-18 (5th Cir. 1995) (motorcycle policeman qualified to testify about motorcycle rider's leg protection in products liability action even though he was not an engineer), *cert. denied*, 116 S. Ct. 705 (1996); *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 734-35 (8th Cir. 1995) (expert's qualifications were "impressive"—district court did not abuse its discretion by permitting him to testify), *cert. denied*, 116 S. Ct. 1268 (1996); *United States v. Davis*, 40 F.3d 1069, 1075 (10th Cir. 1994) (specially trained FBI agent qualified to testify as DNA expert); *Edmonds v. Illinois Cent. Gulf R.R.*, 910 F.2d 1284, 1286-87 (5th Cir. 1990) (clinical psychologist not qualified to testify about physiological effects of stress); *Stull v. Fuqua Indus., Inc.*, 906 F.2d 1271, 1275 (8th Cir. 1990) (mechanical engineer not qualified to testify about human anatomy).

46. *Bammerlin v. Navistar Int'l Transp. Corp.*, 30 F.3d 898, 901 (7th Cir. 1994).

47. *See, e.g.,* *Maier v. Continental Cas. Co.*, 76 F.3d 535, 541 (4th Cir. 1996) (CPA not permitted to make economic predictions for business); *Morse/Diesel, Inc. v. Trinity Indus., Inc.*, 67 F.3d 435, 444 (2d Cir. 1995) (accountant could not testify about cost allocations because they were beyond her field of expertise); *Everett v. Georgia-Pacific Corp.*, 949 F. Supp. 856, 857-58 (S.D. Ga. 1996) (family medicine practitioner not qualified to testify about toxicology); *In re TMI Litig. Cases Consol. II*, 911 F. Supp. 775, 797-98 (M.D. Pa. 1996) (meteorologist found not qualified to testify about estimated doses of radioactive gases); *Maddy v. Vulcan Materials Co.*, 737 F. Supp. 1528, 1533 (D. Kan. 1990) (pulmonary specialist attempted to testify about toxic exposure).

48. *See, e.g.,* *Pedraza v. Jones*, 71 F.3d 194, 197 (5th Cir. 1995) (refusing to allow 30-year heroin addict to testify as an expert on heroin withdrawal when affidavit lacked foundation and was scientifically weak).

professional qualifications may not save an expert who lacks experience in the subject industry, or who is unaware of current industry practices.<sup>49</sup>

The key issue when evaluating an expert's qualifications is whether he intends to offer truly scientific testimony, or whether he intends to opine about "technical" applications or industry practices. For example, is the expert a medical doctor testifying about a causal link between chemical exposure and cancer, or is he a career window washer who intends to testify about the safe use of scaffolding or a bosun's seat? The former situation clearly calls for stricter judicial scrutiny of the proposed expert's qualifications. As the *Diviero v. Uniroyal Goodrich Tire Co.*<sup>50</sup> court explained:

An expert's experience is given significant weight in determining the witness' qualifications as an expert if only technical knowledge is required. If, however, scientific knowledge is necessary the expertise must be coextensive with the particular scientific discipline . . . . Expertise in the technology of fruit is not sufficient when analyzing the science of apples.<sup>51</sup>

A trial court may not exclude expert testimony simply because the challenged expert lacks the degree or training that the court believes most appropriate.<sup>52</sup>

Courts interpret Rule 702 liberally, which is troublesome when proposed expert testimony is novel or controversial. For many years, courts encountering unfamiliar expert testimony applied the test derived from *Frye v. United States*.<sup>53</sup> The *Frye* standard requires that the scientific principle or theory supporting the subject expert testimony be "sufficiently established to have gained general acceptance in the particular field in which it belongs."<sup>54</sup> *Frye* essentially asks courts to "count noses" to determine general acceptance.

Some courts began rejecting the *Frye* "general acceptance" standard following the enactment of the Federal Rules of Evidence in 1975.<sup>55</sup> Rule 702 requires only that expert testimony assist the trier of fact; it does not mandate general acceptance. Critics therefore argued that absent an express *Frye* limitation in Rule 702, the general acceptance standard no longer existed. On

49. See, e.g., *Meyerhoff v. Michelin Tire Corp.*, 70 F.3d 1175, 1182 (10th Cir. 1995) (engineer in products liability case).

50. 919 F. Supp. 1353 (D. Ariz. 1996), *aff'd*, 114 F.3d 851 (9th Cir. 1997).

51. *Id.* at 1357 (citations omitted); accord *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1269-70 & n.3 (9th Cir. 1994) (distinguishing between experts' qualifications depending on whether intended testimony is scientific, or something other than scientific).

52. *Waldorf v. Shuta*, 916 F. Supp. 423, 430 (D.N.J. 1996) (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 741 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1253 (1995)).

53. 293 F. 1013 (D.C. Cir. 1923).

54. *Id.* at 1014.

55. See, e.g., *United States v. Downing*, 753 F.2d 1224, 1233-37 (3d Cir. 1985).

the other hand, the general acceptance standard's proponents asserted that Rule 702's silence signalled *Frye*'s incorporation.<sup>56</sup> In any event, Rule 702's failure to specifically address *Frye* resulted in the general acceptance standard's survival.<sup>57</sup>

The Supreme Court finally addressed the *Frye* general acceptance standard in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>58</sup> Summarizing the Court's decision, Justice Blackmun wrote:

"General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid evidence will satisfy those demands.<sup>59</sup>

The Court noted, however, that *Frye*'s displacement by the Federal Rules of Evidence:

[D]oes not mean . . . that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.<sup>60</sup>

*Daubert* makes clear that proposed scientific or expert testimony must be supported by appropriate validation.<sup>61</sup> For Rule 702 purposes, "evidentiary reliability" means "trustworthiness."<sup>62</sup> Trial judges' screening of purportedly

---

56. See Douglas R. Richmond, *Human Factors Experts in Personal Injury Litigation*, 46 ARK. L. REV. 333, 353-54 (1993).

57. See, e.g., *Christopherson v. Allied Signal Corp.*, 939 F.2d 1106, 1115-16 (5th Cir. 1991); *Novak v. United States*, 865 F.2d 718, 721 (6th Cir. 1989), *cert. denied*, 503 U.S. 912 (1992); *Kropinski v. World Plan Exec. Council—US*, 853 F.2d 948, 956-57 (D.C. Cir. 1988); see also *Joiner v. General Elec. Co.*, 78 F.3d 524, 529 (11th Cir. 1996) (observing that despite the enactment of the Federal Rules of Evidence, "most courts continued to adhere to the 'general acceptance' test"), *cert. granted*, 117 S. Ct. 1243 (1997); *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1042 (2d Cir. 1995) ("Until 1993, the overwhelming majority of courts followed the so-called *Frye* test . . .").

58. 509 U.S. 579 (1993).

59. *Id.* at 597-98.

60. *Id.* at 589.

61. *Id.* at 590.

62. *American & Foreign Ins. Co. v. General Elec. Co.*, 45 F.3d 135, 138 (6th Cir. 1995); *Bradley v. Brown*, 42 F.3d 434, 438 (7th Cir. 1994).

expert or scientific opinion now ensures the trustworthiness once guaranteed by the *Frye* general acceptance standard.

The *Daubert* court identified four factors bearing on the trial court's assessment of whether the reasoning or methodology underlying expert testimony is scientifically valid. The first *Daubert* factor is whether the scientific theory or technique at issue can be and has been tested. A scientific explanation must be capable of empirical test.<sup>63</sup> "Testability" is central to the scientific method. Modern scientific methodology is based on testing hypotheses to see if they can be falsified.<sup>64</sup> Second, the scientific theory being advanced must be subject to peer review. "Peer review" refers to scrutiny by the scientific community. An expert's opinion based on information that cannot be independently verified cannot be admissible because there is no guarantee "that substantive flaws in [the expert's] methodology [have been] detected."<sup>65</sup> Conversely, scrutiny by the scientific community is a component of "good science," because it increases the likelihood that substantive flaws will be uncovered.<sup>66</sup> Although not dispositive, publication in a peer-reviewed journal is a relevant consideration in assessing scientific validity.<sup>67</sup> The third *Daubert* factor the trial court must take into account is the known or potential rate of error in any scientific technique, as well as the existence and maintenance of standards controlling the technique's operation.<sup>68</sup> Both the rate of error and controlling standards affect evidentiary reliability. Finally, "general acceptance" can yet bear on the admissibility of expert testimony. Widespread professional acceptance can be an important factor in ruling particular evidence admissible. On the other hand, a known technique that has attracted only minimal support within the related scientific community may properly be viewed with skepticism.<sup>69</sup>

The *Daubert* inquiry extends beyond an examination of the reliability of the challenged scientific theories or methodology in the abstract.<sup>70</sup> "In order to determine whether scientific *testimony* is reliable, the [trial] court must conclude that the testimony was derived from the application of a reliable methodology or principle in the particular case."<sup>71</sup> Scientists, no matter how reputable, are not

---

63. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993) (quoting C. HEMPEL, *PHILOSOPHY OF NATURAL SCIENCE* 49 (1966)).

64. *See id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *United States v. Martinez*, 3 F.3d 1191, 1197-98 (8th Cir. 1993), *cert. denied*, 510 U.S. 1062 (1994).

71. *Id.* at 1198.

permitted to base their testimony on work undertaken or methods specially employed in anticipation of litigation.<sup>72</sup> Experts' opinions must be based on methods generally employed in their normal academic or professional endeavors.<sup>73</sup> Where experts' findings flow from their own research or regular research activities, as compared to work performed at litigants' direction or request, their testimony is less likely to be influenced or biased by promised compensation.<sup>74</sup> Determining whether a method, technique, or theory constitutes the "good science" necessary to make related expert testimony admissible therefore demands case-specific scrutiny.

In *Joiner v. General Electric Co.*,<sup>75</sup> plaintiff Robert Joiner and his wife alleged that Mr. Joiner developed lung cancer as a result of exposure to polychlorinated biphenyls (PCBs). Joiner claimed that while his history of cigarette smoking and his family's history of lung cancer may have predisposed him to developing lung cancer, his exposure to PCBs and their derivatives (furans and dioxins) promoted the development of his cancer.<sup>76</sup> The district court deemed inadmissible all of the plaintiffs' experts' testimony that Joiner's exposure to PCBs, furans, and dioxins caused his cancer. The district court then entered summary judgment in the defendants' favor,<sup>77</sup> from which the plaintiffs appealed.

The Eleventh Circuit Court of Appeals applied *Daubert* to the plaintiffs' claims. The *Joiner* court first determined that the plaintiffs' experts' methodology, procedures, and information supporting their opinions were scientifically reliable.<sup>78</sup> The plaintiffs' two chief experts were Dr. Daniel Teitelbaum, a clinical toxicologist, and Dr. Arnold Schecter, a preventative medicine specialist. Both doctors were eminently qualified; indeed, they appeared to enjoy good national reputations.<sup>79</sup> Both experts familiarized themselves with the specifics of Joiner's health history and disease, and both reviewed pertinent medical literature.<sup>80</sup> Dr. Teitelbaum examined Joiner, interviewed him and reviewed his medical records, and reviewed the depositions

---

72. *Khan v. State Oil Co.*, 93 F.3d 1358, 1365 (7th Cir. 1996), *cert. granted in part*, 117 S. Ct. 941 (1997). Similarly, an expert's cross-examination in other cases about his theories or methodology is not a substitute for peer review. *See Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 297 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1592 (1997).

73. *Kahn*, 93 F.3d at 1365.

74. *Jones v. United States*, 933 F. Supp. 894, 897 (N.D. Cal. 1996).

75. 78 F.3d 524 (11th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (1997).

76. *Id.* at 528.

77. *Id.* at 528-29.

78. *Id.* at 530-31.

79. *Id.* at 531.

80. *Id.*

of Joiner's family and his coworkers.<sup>81</sup> Dr. Schecter interviewed Joiner and reviewed his medical records, as well as viewing a videotape of Joiner's working conditions related to his alleged toxic exposure.<sup>82</sup> Each doctor utilized "numerous scientific studies and authorities" in arriving at his respective opinions.<sup>83</sup>

Likewise, Drs. Teitelbaum and Schecter each utilized scientifically reliable methods and procedures in gathering and assimilating all of the information forming their opinions.<sup>84</sup> Each doctor asserted that the procedures he employed in arriving at his opinions were generally accepted in the medical community, a point that the defendants did not dispute.<sup>85</sup> The doctors' extensive experience in their respective fields further augmented the reliability of their methodology and reasoning.<sup>86</sup>

The *Joiner* court especially criticized the trial court's review of the bases for Drs. Teitelbaum's and Schecter's opinions in its quest to determine scientific reliability.<sup>87</sup> For example, the district court rejected the plaintiffs' experts' two animal studies because of their limited number, because they used massive doses of PCBs, and because they were conducted on animals instead of humans.<sup>88</sup> None of these reasons were sufficient to render the experts' testimony unreliable. The question is whether the expert's use of challenged studies represents sound methodology.<sup>89</sup> The number of studies is irrelevant and it is improper to deem research unreliable solely because it employs animal subjects.<sup>90</sup>

"As *Daubert* makes clear," the *Joiner* court observed, a district court "may not decide whether an expert's opinions are correct, but merely whether the bases supporting the conclusions are reliable."<sup>91</sup> Instead of reviewing the bases for the experts' opinions to screen out mere speculation, the district court excluded the experts' testimony because it drew different conclusions from their research.<sup>92</sup> This it should not have done. Courts should simply satisfy themselves as to the reliability of proffered expert testimony, "leaving the jury to decide the correctness of competing expert opinions."<sup>93</sup>

---

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 532.

85. *Id.*

86. *Id.*

87. *See id.* at 532-33.

88. *Id.* at 532.

89. *Id.*

90. *Id.*

91. *Id.* at 533.

92. *Id.*

93. *Id.*



While the *Joiner* court never expressly so stated, it appears from the opinion that it concluded that the plaintiffs' experts' testimony satisfied the first three *Daubert* prongs: (1) "testability"; (2) peer review of the methodology or reasoning; and (3) the known or potential rate of error in the scientific technique. The fourth *Daubert* factor—general acceptance in the relevant scientific community—was conceded by the defendants.

The Third Circuit Court of Appeals applied *Daubert* in another PCB exposure case, *In re Paoli Railroad Yard PCB Litigation*.<sup>94</sup> The *Paoli* defendants challenged the methodologies used by the plaintiffs' two expert physicians, and particularly challenged the experts' differential diagnoses.<sup>95</sup> Differential diagnosis involves the testing of a falsifiable hypothesis (e.g., PCBs cause cancer) by attempting to rule out alternative causes.<sup>96</sup>

The *Paoli* court focused on the standards controlling the experts' differential diagnoses. Given the special problems attending doctors' differential diagnoses, the *Paoli* court noted that it had to be flexible in conducting its *Daubert* inquiry. The key factor was the doctors' use of standard diagnostic techniques in gathering medical information. The more standard the technique a practice, the more likely a court is to find that the challenged methodology is reliable.<sup>97</sup>

The court concluded that the district court could only exclude the experts' testimony under Rule 702 if either (1) the experts engaged in very few standard diagnostic techniques by which doctors normally rule out alternative causes and offered no good explanation for why their conclusions remained reliable; or (2) the defendants pointed to some likely cause of injuries other than PCB exposure and the plaintiffs' experts offered no reasonable explanation as to why they believed the defendants' actions were a substantial factor in the particular plaintiff's illness.<sup>98</sup> The *Paoli* court specifically noted that physicians who evaluate patients in preparation for litigation "should seek more than a patient's self-report of symptoms or illness and hence should either examine the patient or review the patient's medical records" in order to render an expert opinion.<sup>99</sup> Where the plaintiffs' experts based their conclusions solely on plaintiffs' self-reports of illness or symptoms, the district court properly excluded their testimony as being unreliable.<sup>100</sup>

---

94. 35 F.3d 717 (3d Cir. 1994).

95. *Id.* at 752-71.

96. *Id.* at 758.

97. *Id.*

98. *Id.* at 760.

99. *Id.* at 762.

100. *Id.*

*Daubert* spawned a number of decisions involving scientific evidence.<sup>101</sup> The Tenth Circuit has generously interpreted *Daubert* to support the admission of expert testimony.<sup>102</sup> The District of Columbia,<sup>103</sup> Second,<sup>104</sup> Fourth,<sup>105</sup>

---

101. State courts also have been called upon to review the admissibility of scientific evidence and to consider *Daubert's* application. Several states have apparently adopted *Daubert* without doing so expressly. See, e.g., *Nelson v. State*, 628 A.2d 69, 73-74 (Del. 1993); *Harrison v. State*, 644 N.E.2d 1243, 1250 n.12, 1251 n.15 (Ind. 1995); *Hutchison v. American Family Mut. Ins. Co.*, 514 N.W.2d 882, 885-88 (Iowa 1994); *Nelson v. American Sterilizer Co.*, No. 199685, 1997 WL 265030 (Mich. Ct. App. May 16, 1997); *State v. Brooks*, 643 A.2d 226, 229 (Vt. 1993). The Supreme Court of Arkansas expressed its approval of *Daubert* in *Jones v. State*, 862 S.W.2d 242 (Ark. 1993), but found its application unnecessary in the case at bar. *Id.* at 244-45. Massachusetts adopted *Daubert* in *Commonwealth v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994), while labeling "general acceptance" the most significant issue in the analysis of scientific evidence. *Id.* at 1349. Kentucky, Louisiana, Montana, New Mexico, South Dakota, Texas and West Virginia have all adopted *Daubert*. See *Mitchell v. Commonwealth*, 908 S.W.2d 100, 101 (Ky. 1995); *State v. Foret*, 628 So. 2d 1116, 1121-23 (La. 1993); *State v. Moore*, 885 P.2d 457, 471 (Mont. 1994); *State v. Alberico*, 861 P.2d 192, 202-04 (N.M. 1993); *State v. Hofer*, 512 N.W.2d 482, 484 (S.D. 1994); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 554-60 (Tex. 1995); *State v. Beard*, 461 S.E.2d 486, 491-93 (W. Va. 1995); *Wilt v. Buracker*, 443 S.E.2d 196, 200-03 (W. Va. 1993), *cert. denied*, 114 S. Ct. 2137 (1994).

Alaska, Arizona, California, Florida, Kansas, Maryland, Nebraska, New Hampshire, New York and Washington continue to adhere to the *Frye* general acceptance test. See *Mattox v. State*, 875 P.2d 763, 764-65 (Alaska 1994); *State v. Bible*, 858 P.2d 1152, 1181-83 (Ariz. 1993), *cert. denied*, 511 U.S. 1046 (1994); *People v. Leahy*, 882 P.2d 321, 324-31 (Cal. 1994); *Flanagan v. State*, 625 So. 2d 827, 829 n.2 (Fla. 1993); *State v. Hill*, 895 P.2d 1238, 1245-47 (Kan. 1995); *United States Gypsum Co. v. Mayor of Baltimore*, 647 A.2d 405, 423 (Md. 1994); *State v. Carter*, 524 N.W.2d 763, 777-79 (Neb. 1994); *State v. Vandebogart*, 652 A.2d 671, 677-78 (N.H. 1994); *People v. Wesley*, 633 N.E.2d 451, 453-55 (N.Y. 1994); *State v. Riker*, 869 P.2d 43, 48 n.1 (Wash. 1994). Colorado apparently adheres to *Frye*. See *Fishback v. People*, 851 P.2d 884, 888-91 (Colo. 1993) (reiterating support for *Frye* and applying the general acceptance standard to DNA evidence). A word of caution: *Fishback* was decided two months before the Supreme Court decided *Daubert*.

*Daubert's* application is an open question in many states. See, e.g., *City of Fargo v. McLaughlin*, 512 N.W.2d 700, 705 n.2 (N.D. 1994) (mentioning both *Frye* and *Daubert*, but applying no discernable standard). The Supreme Court of Connecticut observed in *State v. Ali*, 660 A.2d 337, 350 n.15 (Conn. 1995), that it was not being called upon to evaluate its *Frye* standard in light of *Daubert*, and thus it did not. The Supreme Court of Missouri declined to address *Daubert* and the Missouri equivalent of Rule 702 in *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852, 860 (Mo. 1993). The Supreme Court of Minnesota skirted *Daubert* in *State v. Hodgson*, 512 N.W.2d 95, 98 (Minn. 1994).

102. See, e.g., *Robinson v. Missouri Pac. R.R.*, 16 F.3d 1083 (10th Cir. 1994)

Fifth,<sup>106</sup> Sixth,<sup>107</sup> Eighth,<sup>108</sup> and Ninth Circuits<sup>109</sup> have all liberally admitted scientific evidence following *Daubert*.

A number of federal courts have excluded or rejected expert testimony since *Daubert*.<sup>110</sup>

(video animation of hypothetical car-train collision); *United States v. Muldrow*, 19 F.3d 1332 (10th Cir.) (permissible for police officer to testify that amount of cocaine defendant possessed reflected intent to distribute the drug), *cert. denied*, 513 U.S. 862 (1994).

103. *See, e.g., Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) (medical testimony concerning causal link between prescription drug Depo-Provera and birth defects), *cert. denied sub nom. Upjohn Co. v. Ambrosini*, 117 S. Ct. 1572 (1997).

104. *See, e.g., United States v. Daccarett*, 6 F.3d 37, 58 (2d Cir. 1993) (DEA agent's testimony about methods of drug operations and money laundering).

105. *See, e.g., United States v. Bynum*, 3 F.3d 769, 772-73 (4th Cir. 1993) (chromatograph analysis of cocaine).

106. *See, e.g., Carroll v. Morgan*, 17 F.3d 787, 789-90 (5th Cir. 1994); *see also United States v. McCaskey*, 9 F.3d 368, 379-80 (5th Cir. 1993) (rejecting defendant's claim that scientific test was not generally accepted without relying on *Daubert*).

107. *See, e.g., Cantrell v. GAF Corp.*, 999 F.2d 1007, 1012-14 (6th Cir. 1993) (medical testimony—*asbestos* exposure); *United States v. Bonds*, 12 F.3d 540, 549-66 (6th Cir. 1993) (DNA tests).

108. *See, e.g., United States v. Parker*, 32 F.3d 395, 400 (8th Cir. 1994) (DEA agent allowed to testify that entries in notebook were consistent with records of drug transactions); *United States v. Martinez*, 3 F.3d 1191, 1195-99 (8th Cir. 1993) (DNA profiling), *cert. denied*, 510 U.S. 1062 (1994).

109. *See, e.g., United States v. Alonso*, 48 F.3d 1536, 1539-40 (9th Cir. 1995) (police officers allowed to testify that criminal suspect attempted to avoid or detect surveillance); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1123-25 (9th Cir. 1994) (medical testimony that silicone breast implants caused plaintiff's autoimmune disease), *cert. denied*, 513 U.S. 1082 (1995); *United States v. Quinn*, 18 F.3d 1461, 1464-65 (9th Cir. 1994) (photogrammetry evidence used to determine suspect's height from surveillance photographs), *cert. denied*, 512 U.S. 1242 (1994).

110. *See, e.g., Raynor v. Merrell Pharm., Inc.*, 104 F.3d 1371 (D.C. Cir. 1997) (plaintiffs' experts not permitted to link drug Bendectin to birth defects); *Bogosian v. Mercedes-Benz, Inc.*, 104 F.3d 472, 477-79 (1st Cir. 1997) (certified master mechanic not allowed to testify about automobile transmission design defect); *Smelser v. Norfolk S. Ry.*, 105 F.3d 299 (6th Cir. 1997) (biomechanics expert should not have been allowed to testify about shoulder belt failure); *Wintz v. Northrop Corp.*, 110 F.3d 508, 512-14 (7th Cir. 1997) (toxicologist not permitted to testify about effect of *in utero* bromide exposure); *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194, 195-98 (5th Cir. 1996) (toxicologists not allowed to testify about alleged link between ethylene oxide exposure and brain cancer); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 382 (5th Cir. 1996) (ecologist not allowed to testify about harm to humans from chemical exposure based on study using rats); *Braun v. Lorillard, Inc.*, 84 F.3d 230, 233-35 (7th Cir. 1996) (biochemist in asbestosis case); *Peitzmeier v. Hennessy Indus., Inc.*, 97 F.3d 293, 296-98

(8th Cir. 1996) (engineering expert in products liability case involving tire changing machine), *cert. denied*, 117 S. Ct. 1552 (1997); *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107-08 (8th Cir. 1996) (industrial hygienist and pharmacologist in toxic tort case); *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 596-98 (9th Cir. 1996) (birth defect allegedly attributable to fertility drug); *United States v. Dorsey*, 45 F.3d 809, 813-15 (4th Cir.) (forensic anthropologists who reviewed surveillance videotape), *cert. denied*, 115 S. Ct. (1995); *American & Foreign Ins. Co. v. General Elec. Co.*, 45 F.3d 135, 137-39 (6th Cir. 1995) (electrical engineering testimony in wiring short circuit case); *Gier v. Educational Serv. Unit No. 16*, 66 F.3d 940, 942-44 (8th Cir. 1995) (psychological evaluations in child sexual abuse case); *Pestel v. Vermeer Mfg. Co.*, 64 F.3d 382 (8th Cir. 1995) (mechanical engineer—products liability action); *Watkins v. Schriver*, 52 F.3d 769, 771-72 (8th Cir. 1995) (medical testimony—mechanics of injury); *United States v. Rice*, 52 F.3d 843, 846-47 (10th Cir. 1995) (testimony by former tax prosecutor that government should not have filed criminal tax case), *cert. denied*, 116 S. Ct. 2536 (1996); *Bammerlin v. Navistar Int'l Transp. Corp.*, 30 F.3d 898, 901-902 (7th Cir. 1994) (testimony on meaning and applicability of safety standards); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105-07 (7th Cir.) (medical testimony—radiation exposure), *cert. denied*, 512 U.S. 1222 (1994); *Pries v. Honda Motor Co.*, 31 F.3d 543, 545 (7th Cir. 1994) (biomechanics expert testifying about experiment on car door latch); *Sorensen v. Shaklee Corp.*, 31 F.3d 638, 645-51 (8th Cir. 1994) (drug products liability action—medical testimony by clinical toxicologist, geneticist and epidemiologist); *Clair v. Burlington N.R.R.*, 29 F.3d 499, 501-02 (9th Cir. 1994) (medical testimony—workplace chemical exposure); *Rogers v. Ford Motor Co.*, 952 F. Supp. 606 (N.D. Ind. 1997) (plaintiffs' expert engineer not allowed to testify about alleged seat belt failure); *Cuevas v. E.I. DuPont de Nemours & Co.*, 956 F. Supp. 1306, 1308-13 (S.D. Miss. 1997) (barring toxicology testimony by treating physicians); *Reiff v. Convergent Techs.*, 957 F. Supp. 573, 577-83 (D.N.J. 1997) (excluding engineer's testimony in keyboard carpal tunnel case); *Kelley v. American Heyer-Schulte Corp.*, 957 F. Supp. 873 (W.D. Tex. 1997) (excluding epidemiologist's and rheumatologist's testimony in breast implant case); *Carmichael v. Samiyag Tires, Inc.*, 923 F. Supp. 1514, 1520-21 (S.D. Ala. 1996) (mechanical engineer in tire failure case); *Diviero v. Uniroyal Goodrich Tire Co.*, 919 F. Supp. 1353, 1358-60 (D. Ariz. 1996) (engineer in tire failure case), *aff'd*, 114 F.3d 851 (9th Cir. 1997); *Sanderson v. International Flavors & Fragrances, Inc.*, 950 F. Supp. 981 (C.D. Cal. 1996) (doctors not allowed to testify on toxic effect of aldehydes in fragrances); *Jones v. United States*, 933 F. Supp. 894, 897-901 (N.D. Cal. 1996) (doctor and pharmacist not allowed to testify about drug interaction); *Meyers v. Arcudi*, 947 F. Supp. 581, 586-88 (D. Conn. 1996) (refusing to admit polygraph evidence in a sexual harassment case); *Cartwright v. Home Depot U.S.A., Inc.*, 936 F. Supp. 900, 905-07 (M.D. Fla. 1996) (physicians attempting to testify about asthma resulting from latex paint exposure); *Haggerty v. Upjohn Co.*, 950 F. Supp. 1160 (S.D. Fla. 1996) (pharmacologist not allowed to testify that Halcion caused undesirable psychiatric and behavioral effects); *Everett v. Georgia-Pacific Corp.*, 949 F. Supp. 856, 858-59 (S.D. Ga. 1996) (doctor could not link plaintiff's health problems to chemical exposure); *Dukes v. Illinois Cent. R.R.*, 934 F. Supp. 939, 945-53 (N.D. Ill. 1996) (neurosurgeon attempting to testify about cause of railroad worker's carpal tunnel syndrome); *Navarro v. Fuji Heavy Indus., Ltd.*, 925 F. Supp. 1323, 1328-

29(N.D. Ill. 1996) (engineering testimony in product liability case); *Zarecki v. National R.R. Passenger Corp.*, 914 F. Supp. 1566, 1573-74 (N.D. Ill. 1996) (treating physician in keyboard carpal tunnel case); *Stibbs v. MAPCO, Inc.*, 945 F. Supp. 1220, 1222-25 (S.D. Iowa 1996) (engineers' attempted use of "differential diagnosis" in explaining LP gas/hot water heater explosion); *Miller v. Heaven*, 922 F. Supp. 495, 500-04 (D. Kan. 1996) (polygraph evidence); *Rice v. Cincinnati, New Orleans & Pac. Ry.*, 920 F. Supp. 732, 736-38 (E.D. Ky. 1996) (trainmen in FELA case); *Stalnaker v. General Motors Corp.*, 934 F. Supp. 179, 181 (D. Md. 1996) (expert testimony concerning seat belt latch in automobile products liability case); *Cabrera v. Cordis Corp.*, 945 F. Supp. 209, 211-14 (D. Nev. 1996) (medical testimony in products liability case involving brain shunt); *Tassin v. Sears, Roebuck & Co.*, 946 F. Supp. 1241, 1244-52 (M.D. La. 1996) (engineer's alternative designs in product liability case); *Valentine v. Pioneer Chlor Alkali Co.*, 921 F. Supp. 666, 669-72, 673-78 (D. Nev. 1996) (medical testimony in chlorine exposure case); *Rutigliano v. Valley Bus. Forms*, 929 F. Supp. 779, 783-86 (D.N.J. 1996) (occupational physician testifying about formaldehyde exposure); *Dennis v. Pertec Computer Corp.*, 927 F. Supp. 156, 158-62 (D.N.J. 1996) (ergonomist and industrial engineer in repetitive motion case); *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996) (medical experts attempting to link silicone breast implants and various ailments); *In re TMI Litig. Cases Consol. II*, 911 F. Supp. 775, 786-810, 824-26 (M.D. Pa. 1996) (various scientists in case involving alleged exposure to radioactive gases from a nuclear reactor); *Bennett v. PRC Pub. Sector, Inc.*, 931 F. Supp. 484, 488-502 (S.D. Tex. 1996); *Ballinger v. Atkins*, 947 F. Supp. 925 (E.D. Va. 1996) (biochemist and internist not allowed to testify about alleged causal link between aspartame and plaintiff's neurological and physical ailments); *City of Tuscaloosa v. Harcros Chems., Inc.*, 877 F. Supp. 1504, 1512-32 (N.D. Ala. 1995) (economic testimony in antitrust case); *Casey v. Ohio Med. Prods.*, 877 F. Supp. 1380, 1383-86 (N.D. Cal. 1995) (expert medical testimony concerning causal link between halothane exposure and liver disease); *Ayers v. Robinson*, 887 F. Supp. 1049, 1058-64 (N.D. Ill. 1995) (economist—hedonic damages); *Schmaltz v. Norfolk & W. Ry.*, 878 F. Supp. 1119, 1120-24 (N.D. Ill. 1995) (herbicide exposure allegedly causing reactive airway dysfunction syndrome); *Tucker v. Nike, Inc.*, 919 F. Supp. 1192, 1195-98 (N.D. Ind. 1995) (podiatrist in case in which athletic shoe allegedly contributed to cause of achilles tendon injury); *In re Aluminum Phosphide Antitrust Litig.*, 893 F. Supp. 1497 (D. Kan. 1995) (economist's attempted use of "before and after" model to establish antitrust damages); *Textron, Inc. v. Barber-Colman Co.*, 903 F. Supp. 1558, 1568-69 (W.D.N.C. 1995) (CERCLA case—hazardous waste contamination); *Grimes v. Hoffman-LaRoche, Inc.*, 907 F. Supp. 33, 35-38 (D.N.H. 1995) (ophthalmologist evaluating photochemical effects on eye); *Summers v. Missouri Pac. R.R. Sys.*, 897 F. Supp. 533, 541-42 (E.D. Okla. 1995) (clinical ecology/multiple chemical hypersensitivity syndrome); *Cavallo v. Star Enter.*, 892 F. Supp. 756 (E.D. Va. 1995) (alleged causal link between aviation jet fuel vapor and various chronic illnesses), *aff'd in part, rev'd in part*, 100 F.3d 1150, 1159 (4th Cir. 1996) (affirming district court's exclusion of expert testimony); *In re Hanford Nuclear Reservation Litig.*, 894 F. Supp. 1436, 1446-49 (E.D. Wash. 1995) (fisheries biology); *Goomar v. Centennial Life Ins. Co.*, 855 F. Supp. 319, 326 (S.D. Cal. 1994) (medical testimony as to claimed psychotic condition), *aff'd*, 76 F.3d 1059 (9th Cir. 1996); *Byrnes v. Honda Motor Co.*, 887 F. Supp. 279, 281-82 (S.D. Fla. 1994) (motorcycle design

*Joy v. Bell Helicopter Textron, Inc.*,<sup>111</sup> is among the more interesting cases because the court's decision was unaffected by *Daubert*. In *Joy*, the District of Columbia Circuit ruled that the district court erred in admitting expert economic testimony on the plaintiff's future earning capacity.<sup>112</sup> The *Joy* court concluded that the district court erred because the expert's testimony was based solely on "guesswork, speculation, and conjecture."<sup>113</sup> *Daubert* played no role in the court's decision because Rule 702 permits expert testimony only when scientific, technical or other specialized *knowledge* will assist the trier of fact. As "the word 'knowledge' connotes more than subjective belief or unsupported speculation," the expert economist's testimony did not meet the Rule 702 standard.<sup>114</sup>

The plaintiff in *Cummins v. Lyle Industries*<sup>115</sup> sued the manufacturer of an industrial trim press in which she lost three fingers. The defendant moved to preclude the testimony of one of the plaintiff's experts, Dr. Thomas Carpenter. Dr. Carpenter was prepared to testify as to the feasibility of several alternative designs for the braking system on the trim press, and to the adequacy of warnings.<sup>116</sup> The district court limited Dr. Carpenter's testimony and, after the defendant prevailed at trial, the plaintiff appealed.<sup>117</sup>

The *Cummins* court first examined whether Dr. Carpenter's intended expert testimony constituted scientific knowledge.<sup>118</sup> With respect to the first *Daubert* factor—whether the proffered opinion has been subjected to the scientific method—Dr. Carpenter's testimony clearly came up short. The *Cummins* court was not satisfied by Dr. Carpenter's explanation that the alternative parts that he believed should be incorporated into the trim press were "off-the-shelf" components, and that other electrical circuits in the machine already incorporated the time-delay relay that he argued should have been employed in the function

---

defect case); *Dana Corp. v. American Standard, Inc.*, 866 F. Supp. 1481, 1498-1503 (N.D. Ind. 1994) (CERCLA case—hazardous waste disposal); *Sullivan v. United States Gypsum Co.*, 862 F. Supp. 317, 321 (D. Kan. 1994) (economic testimony—hedonic damages); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1382, 1391-99 (W.D. Mo. 1994) (hydrogeological testimony in groundwater pollution case); *Hein v. Merck & Co.*, 868 F. Supp. 230, 232-35 (M.D. Tenn. 1994) (economic testimony—hedonic damages); *Wade-Greaux v. Whitehall Labs., Inc.*, 874 F. Supp. 1441 (D.V.I.) (drug product liability—birth defects), *aff'd*, 46 F.3d 1120 (3d Cir. 1994).

111. 999 F.2d 549 (D.C. Cir. 1993).

112. *Id.* at 568-69.

113. *Id.*

114. *Id.* at 570 (quoting *Daubert v. Merrel Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir. 1995)).

115. 93 F.3d 362 (7th Cir. 1996).

116. *Id.* at 365.

117. *Id.* at 366.

118. *See id.* at 368.

at issue.<sup>119</sup> Because Dr. Carpenter conducted no testing to substantiate his opinions, his testimony “could not fairly be characterized as scientific knowledge.”<sup>120</sup> This was especially true given the fact that Dr. Carpenter’s opinions “clearly [lent] themselves to testing and substantiation by the scientific method.”<sup>121</sup>

Dr. Carpenter’s testimony was further undermined by his lack of scientific background investigation. Dr. Carpenter acknowledged that he read no studies, surveys, or analyses regarding the design, manufacture, or use of industrial trim presses.<sup>122</sup> With respect to the adequacy of the manufacturer’s warnings, Dr. Carpenter at least read texts discussing warnings; however, he did not know what warnings would have been effective in the absence of testing.<sup>123</sup>

The *Cummins* court also found that Dr. Carpenter’s intended testimony failed the *Daubert* test because his theories were never exposed to peer review. Dr. Carpenter never published an article or study concerning the incorporation of alternative design features in machinery such as the trim press at issue.<sup>124</sup>

The district court had no occasion to address the third *Daubert* factor, *i.e.*, whether the expert testimony has been evaluated in light of the potential rate of error in the scientific technique.<sup>125</sup> It was clear from the circumstances, however, that Dr. Carpenter’s testimony could not be evaluated in light of any potential rate of error. The complete lack of testing precluded such scrutiny. Dr. Carpenter’s intended testimony thus had to fail *Daubert*’s third prong. Dr. Carpenter’s failure to test his proposed design alternatives violated or failed the accepted method for gathering and evaluating data in design defect cases.<sup>126</sup>

The *Cummins* court thus concluded that the district court properly adhered to the methodology established in *Daubert*. The district court “carefully performed its gate keeping function under Rule 702.”<sup>127</sup> Accordingly, it did not abuse its discretion by precluding Dr. Carpenter’s expert testimony on alternative designs and the adequacy of warnings.<sup>128</sup>

Other courts have reached similar results. For example, the *American & Foreign Insurance Co. v. General Electric Co.*<sup>129</sup> court affirmed a district court’s determination that the plaintiff’s electrical engineering expert could not satisfy

---

119. *Id.*

120. *Id.* at 369.

121. *Id.*

122. *Id.* at 370.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 371.

129. 45 F.3d 135 (6th Cir. 1995).

at least two of *Daubert's* four prongs.<sup>130</sup> The expert's theories were not accepted by other experts in the same field, and his testing and his theory were not of a type reasonably relied upon by others in his field.<sup>131</sup> Moreover, his testing was woefully inadequate. He did not preserve the raw data from his tests and he never calibrated the instruments used to perform those tests.<sup>132</sup>

In *Frymire-Brinati v. KPMG Peat Marwick*,<sup>133</sup> the district court's decision to admit expert accounting testimony was at issue. The plaintiff's chief witness was her expert accountant, who testified to the market value of her investments over the defendant's objection.<sup>134</sup> The district court did not conduct the preliminary assessment of the expert's reasoning or methodology that *Daubert* requires before allowing him to testify.<sup>135</sup> The expert admitted on cross-examination that his valuations were not market values, but were only a fairly simple pass at determining the magnitude of the problems the plaintiff alleged. The expert further admitted that, in reaching his opinions, he did not employ methodology that valuation experts find essential.<sup>136</sup>

The *Frymire-Brinati* court held that the district court erred by allowing the expert to testify. The district court should have assessed the expert's reasoning and methodology before admitting his testimony. Had the district court performed its *Daubert* function, it could not properly have admitted the expert's valuation under Rule 702.<sup>137</sup>

*Daubert* also requires "scientific fit." In other words, expert testimony must advance a material aspect of the proposing party's case.<sup>138</sup> "Scientific fit" problems arise independently of expert qualification issues or deficiencies in experts' scientific knowledge or methodology, although the distinction between "scientific validity" and "scientific fit" is not always clear. Essentially, Rule 702's helpfulness standard requires a valid scientific connection to the pertinent inquiry in the case as a precondition to admissibility.<sup>139</sup> The pertinent inquiry is often causation.<sup>140</sup> If an expert cannot state a causal connection in terms of

---

130. *Id.* at 140.

131. *Id.* at 139.

132. *Id.*

133. 2 F.3d 183 (7th Cir. 1993).

134. *Id.* at 186.

135. *Id.* at 187.

136. *Id.* at 186.

137. *Id.* at 187.

138. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993).

139. *Id.* at 591-92.

140. See, e.g., *Smelser v. Norfolk S. Ry.*, 105 F.3d 299, 305 (6th Cir. 1997); *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318-19 (7th Cir. 1996); *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594, 596-98 (9th Cir. 1996); *Deimer v. Cincinnati Sub-Zero Prods., Inc.*, 58 F.3d 341, 344-45 (7th Cir. 1995); *Conde v. Velsicol Chem. Corp.*, 24 F.3d 809, 812-



certainty or probability, the expert's testimony must be excluded. The Ninth Circuit's recent *Daubert* decision following the Supreme Court's remand illustrates the consequences of a bad scientific fit.<sup>141</sup>

*Daubert* involved claims of limb reduction birth defects attributable to the prescription drug Bendectin. Between 1957 and 1982, some 17.5 million pregnant women took Bendectin to combat morning sickness. The *Daubert* court applied California substantive law, which required statistical proof that the ingestion of Bendectin more than doubled the likelihood of the plaintiffs' birth defects in order to establish causation.<sup>142</sup> The plaintiffs' experts could testify only that Bendectin was "capable of causing" birth defects.<sup>143</sup> Because the plaintiffs' experts could not quantify this mere possibility or weigh their conclusions about causation without changing their conclusions altogether, they could not show that their findings were derived by scientific method.<sup>144</sup> As a result, their intended testimony was not a good scientific "fit" and was inadmissible.

In *Rosen v. Ciba-Geigy Corp.*,<sup>145</sup> the plaintiff suffered a heart attack several days after he began using a nicotine patch in an attempt to quit smoking. The plaintiff continued to smoke as he wore the patch and he had a history of

14 (6th Cir. 1994); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105-07 (7th Cir. 1994); *Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 614-16 (7th Cir. 1993); *Reiff v. Convergent Techs.*, 957 F. Supp. 573 (D.N.J. 1997); *Kelley v. American Heyer-Schulte Corp.*, 957 F. Supp. 873 (W.D. Tex. 1997); *Sanderson v. International Flavors & Fragrances, Inc.*, 950 F. Supp. 981, 998-1000 (C.D. Cal. 1996); *Jones v. United States*, 933 F. Supp. 894, 900-01 (N.D. Cal. 1996); *Haggerty v. Upjohn Co.*, 950 F. Supp. 1160, 1163-67 (S.D. Fla. 1996); *Dukes v. Illinois Cent. R.R.*, 934 F. Supp. 939, 945-53 (N.D. Ill. 1996); *Stibbs v. MAPCO, Inc.*, 945 F. Supp. 1220, 1222-25 (S.D. Iowa 1996); *Rutigliano v. Valley Bus. Forms*, 929 F. Supp. 779, 783-91 (D.N.J. 1996); *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387 (D. Or. 1996); *Ballinger v. Atkins*, 947 F. Supp. 925, 928-29 (E.D. Va. 1996); *Casey v. Ohio Med. Prods.*, 877 F. Supp. 1380, 1383-86 (N.D. Cal. 1995); *Reynard v. NEC Corp.*, 887 F. Supp. 1500, 1904-08 (M.D. Fla. 1995); *Tucker v. Nike, Inc.*, 919 F. Supp. 1192, 1196-98 (N.D. Ind. 1995); *Pomella v. Regency Coach Lines, Ltd.*, 899 F. Supp. 335, 341-43 (E.D. Mich. 1995); *Grimes v. Hoffman-LaRoche, Inc.*, 907 F. Supp. 33, 37-38 (D.N.H. 1995); *Goewey v. United States*, 886 F. Supp. 1268, 1279-83 (D.S.C. 1995); *Cavallo v. Star Enter.*, 892 F. Supp. 756, 763-73 (E.D. Va. 1995), *aff'd in part, rev'd in part*, 100 F.3d 1150, 1159 (4th Cir. 1996) (affirming exclusion of expert testimony).

For a case in which a court ruled that expert testimony would not meet the plaintiff's causation burden without relying on *Daubert*, see *Sakaria v. Trans World Airlines*, 8 F.3d 164, 171-73 (4th Cir. 1993).

141. *Daubert v. Merrel Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir. 1995).

142. *Id.* at 1320.

143. *Id.* at 1321.

144. *Id.* at 1322.

145. 78 F.3d 316 (7th Cir. 1996).

coronary artery disease, high blood pressure, coronary bypass surgery, and heavy smoking.<sup>146</sup> The plaintiff offered the deposition testimony of Dr. Harry Fozzard, a distinguished cardiologist, to establish a causal link between his use of the nicotine patch and his heart attack.<sup>147</sup> The district court held that Dr. Fozzard's testimony was inadmissible and, without it, the plaintiff could not survive summary judgment.<sup>148</sup> The plaintiff then appealed.

The *Rosen* court easily accepted the district court's determination that "Dr. Fozzard's testimony was not real science."<sup>149</sup> Dr. Fozzard expressed nothing more than an insightful hunch.<sup>150</sup> Nowhere did Dr. Fozzard rule out other causes for the plaintiff's heart attack, nor did he distinguish between the nicotine patch and other contributing factors.<sup>151</sup> Dr. Fozzard never explained how a nicotine overdose could cause a heart attack, which he should have considered given the plaintiff's continued smoking, and he could point to no medical or scientific literature supporting his theory.<sup>152</sup> While the court was willing to carefully consider Dr. Fozzard's opinions based on his professional preeminence, it could not endorse his testimony. "[T]he courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it. There may be evidence to back up [Dr.] Fozzard's claim, but none was presented to the district court."<sup>153</sup>

*Daubert's* effect and meaning have been the topic of considerable debate. *Daubert* did not "work a sea of change over federal evidence law."<sup>154</sup> Courts have not analytically shifted very far from where they were before. The Rule 702 standard remains flexible.<sup>155</sup> There is some question as to whether *Daubert* should be applied only to novel scientific testimony, or whether it is appropriate for all kinds of expert testimony.<sup>156</sup> And, as noted previously,<sup>157</sup> expert

146. *Id.* at 317.

147. *Id.* at 318.

148. *Id.*

149. *Id.*

150. *Id.* at 319.

151. *Id.*

152. *Id.*

153. *Id.*

154. *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996); see also *Compton v. Subaru, Inc.*, 82 F.3d 1513, 1519 (10th Cir. 1996) (*Daubert* does not completely change courts' "traditional analysis under Rule 702. Instead, *Daubert* sets out additional factors the trial court should consider under Rule 702 if an expert witness offers testimony based upon a particular methodology or technique."); *United States v. Sinclair*, 74 F.3d 753, 757 (7th Cir. 1996) ("*Daubert* does not create a special analysis for answering questions about the admissibility of all expert testimony.").

155. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594 (1993).

156. Compare *Thornton v. Caterpillar, Inc.*, 951 F. Supp. 575, 577 (D.S.C. 1997) (holding that the *Daubert* analysis is limited to scientific evidence; it does not apply to

testimony requires case-specific scrutiny; scientific reasoning and methodology defy rigid analysis. *Daubert's* worth thus lies in its formulation of general Rule 702 standards, and the Supreme Court's call to trial courts to fulfill their role as evidentiary gatekeepers. Courts can no longer admit questionable expert testimony anticipating that juries will afford it appropriate weight.<sup>158</sup>

*Daubert's* continuing meaning is uncertain. The Supreme Court granted certiorari in *Joiner v. General Electric Co.*,<sup>159</sup> ostensibly to decide the appellate review standard to be applied to a trial court's decision to exclude expert testimony.<sup>160</sup> But some evidence scholars suggest that implicit in the Court's decision to take the case is its desire to more exactly explain trial courts' "gatekeeping" function.<sup>161</sup> If those scholars are right, federal evidence law relating to expert witnesses may change yet again. If it does, radical change seems very unlikely. Under no circumstances should the Court retreat from *Daubert*, for it has had the beneficial effect of barring a great deal of suspect "science" from courtrooms.

### C. Federal Rules of Evidence 703 and 705

Another important issue is the acceptable foundation for expert testimony. Prior to the enactment of Federal Rule of Evidence 703, expert witnesses based their opinions on facts either known from personal observation or provided by the sponsoring party, usually at trial by way of hypothetical questions. Rule 703 incorporated these traditional bases,<sup>162</sup> but it also added a third category:

---

expert testimony that is technical in nature, or that covers specialized knowledge), with *Rogers v. Ford Motor Co.*, 952 F. Supp. 606, 613 n.5 (N.D. Ind. 1997) (stating that *Daubert* analysis "is appropriate for all kinds of expert testimony").

157. See *supra* notes 70-74 and accompanying text.

158. While *Daubert* emphasizes the importance of a pretrial procedure by which the trial judge scrutinizes challenged expert testimony, a party opposing scientific evidence under *Daubert* must still object to its introduction at trial. Even expert testimony that is questionable under *Daubert* and thus Rule 702 will be admitted if the opposing party fails to contemporaneously object. See, e.g., *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066-67 (9th Cir. 1996) (defendant also failed to insist that district court rule on pre-trial *Daubert* challenge); *McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1406-07 (8th Cir. 1994). In addition to specifically objecting under Rule 702 (and likely Rules 703 and 403), counsel must be sure to object on relevancy grounds, for evidence that is inadmissible under Rule 702 is surely irrelevant.

159. 78 F.3d 524 (11th Cir. 1996), cert. granted, 117 S. Ct. 1243 (1997). See also discussion of *Joiner supra* notes 75-93 and accompanying text.

160. See Marcia Coyle, *Cert. Granted in Expert Witness Case*, NAT'L L.J., Mar. 31, 1997, at B1, B1.

161. See *id.*

162. See, e.g., *United States v. Crabtree*, 979 F.2d 1261, 1270 (7th Cir. 1992)

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.<sup>163</sup>

Experts now are permitted to rely on any facts or data “reasonably relied upon” by other professionals in their field.

Rule 705 is Rule 703’s foundational cousin. Rule 705 provides: “The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.”<sup>164</sup> Rule 705 allows expert witnesses to present “naked opinions.”<sup>165</sup> The opposing party then bears the burden of exploring the expert’s assumptions and the foundation for the expert’s opinions on cross-examination.<sup>166</sup> If cross-examination reveals that the testimony rests on inadequate foundation, the trial court may strike the expert’s testimony.<sup>167</sup>

Rule 705 does not excuse parties from qualifying witnesses as experts. Parties must establish expert witnesses’ qualifications under Rule 702 before eliciting naked opinions. A trial judge retains the right under Rule 705 to insist that he be given the underlying facts or data for an expert’s opinion by way of proffer in order to make a threshold determination of admissibility.<sup>168</sup> Finally, advocates must remember that Rule 705 is designed for trial, where experts can be cross-examined. The rule cannot be used to excuse conclusory expert affidavits submitted in an effort to avoid summary judgment.<sup>169</sup>

Rules 703 and 705 eliminate the time-consuming process of introducing into evidence the mass of material that commonly forms the basis of an expert’s

---

(holding that Rule 703 permitted expert to base his opinion on facts and data learned by attending trial and listening to testimony).

163. FED. R. EVID. 703.

164. FED. R. EVID. 705.

165. *Mid-State Fertilizer Co. v. Exchange Nat’l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989).

166. *See Toucet v. Maritime Overseas Corp.*, 991 F.2d 5, 10 (1st Cir. 1993); *United States v. Whitetail*, 956 F.2d 857, 861-62 (8th Cir. 1992); *Symbol Tech., Inc. v. Opticon, Inc.*, 935 F.2d 1569, 1575 (Fed. Cir. 1991); *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980).

167. *United States v. Sepulveda*, 15 F.3d 1161, 1183 (1st Cir. 1993).

168. *United States v. Brien*, 59 F.3d 274, 278 (1st Cir. 1995).

169. *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir. 1993); *see M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp.*, 981 F.2d 160, 165 (4th Cir. 1992). *But see Monks v. General Elec. Co.*, 919 F.2d 1189, 1192 (6th Cir. 1990).

opinion.<sup>170</sup> Rules 703 and 705 do not afford proposed expert testimony automatic admissibility, however, as *University of Rhode Island v. A.W. Chesterton Co.*<sup>171</sup> demonstrates.

*A.W. Chesterton* involved corrosion damage to a University of Rhode Island (URI) research vessel, the *Endeavor*. URI sued the A.W. Chesterton Company, whose product allegedly failed to remedy the corrosion. At trial, URI called as an expert witness its comptroller, Ronald Osborne, to establish the amount of money it spent to correct the *Endeavor's* corrosion problem allegedly left unremedied by the defendant's system. Osborne, a certified public accountant, directed all URI financial information and accounting practices. URI proffered no other evidence on damages.<sup>172</sup>

The defendant objected to Osborne's testimony before he could state an opinion. The defendant contended that Osborne was not a qualified expert on damage calculations, that the factual bases for his intended testimony included inadmissible hearsay, and that his calculations included inappropriate factors, such as indirect research costs.<sup>173</sup> The trial court sustained the defendant's objection because URI did not establish that the facts on which Osborne relied were reasonably relied upon by experts in damages assessment.<sup>174</sup>

On appeal, URI argued that Rules 703 and 705 afford the right to present unsubstantiated expert testimony on direct examination without first disclosing its factual underpinnings.<sup>175</sup> The *A.W. Chesterton* court had no doubt that Rules 703 and 705 permitted the district court to admit Osborne's opinion testimony, but concluded that the court did not abuse its discretion by excluding the evidence.<sup>176</sup> At a minimum, Rules 703 and 705 suggest that a proponent of expert testimony be prepared to make a limited offer of proof to aid the trial court in determining admissibility if required.<sup>177</sup>

Even though URI's threshold burden was minimal, and may have been readily met, it made no attempt whatever to assuage the district court's legitimate concerns, but chose instead to rely on its perceived "right" to have Osborne's opinion admitted under Rule 703. Apparently, URI came to trial with no supporting documentation whatever to substantiate Osborne's assessment of damages. Based on what can be gleaned from Osborne's preliminary testimony, URI's apparent unpreparedness and recalcitrance may have given

---

170. *Mendes-Silva v. United States*, 980 F.2d 1482, 1485 (D.C. Cir. 1993) (discussing Rule 703); *Symbol Technologies*, 935 F.2d at 1576 (discussing Rule 705).

171. 2 F.3d 1200 (1st Cir. 1993).

172. *Id.* at 1217.

173. *Id.*

174. *Id.*

175. *Id.* at 1218.

176. *Id.*

177. *Id.*

the district court real concerns as to Osborne's methodology. . . . Osborne's "damages" assessment was not based solely on the conventional examination and compilation of documents from which an expert objectively might ascertain the overtime labor costs incurred in repairing Endeavor's ballast tanks, as distinguished from various other projects at URI . . . . Rather, Osborne relied on "interviews" with undisclosed URI employees and "outside vendors," conducted either by himself or other URI officials who reported to him. The trial court quite reasonably expected URI to explain, out of the presence of the jury, the basic assumptions undergirding its witness's seemingly unorthodox method of reconstruction.<sup>178</sup>

Rather than provide foundation for Osborne's intended opinion testimony, URI simply accepted a direct verdict on damages.<sup>179</sup> The defendant prevailed at trial as a result, and the *A.W. Chesterton* court affirmed the district court's judgment.

Rule 703's expansion of the bases for expert testimony spawned questions about the reasonableness of experts' reliance on particular data, facts or information. Does the determination of reasonable reliance fall to the trial judge or to the scientific community of which the expert is a member? There are both liberal and restrictive approaches.<sup>180</sup> Under the liberal view, an expert may form an opinion by reasonably relying upon data used by other experts in the field, but a trial court does not determine the trustworthiness of the subject data.<sup>181</sup> The

178. *Id.*

179. *Id.* at 1219.

180. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1243-44 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987).

181. The liberal view is best illustrated by *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 505 F. Supp. 1313 (E.D. Pa. 1980), *aff'd in part and rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986). In *Zenith Radio*, the defendants attacked the plaintiffs' experts' opinions because the experts relied on materials that were independently ruled inadmissible, and based some reports on documents of questionable reliability. *Id.* at 1320. The plaintiffs argued (1) that expert testimony may consist of any matter found in the expert's field of expertise and (2) the expert determines whether the facts or opinions that formulate the testimony are reasonably relied upon in the field and trustworthy. The defendants argued that the court must (1) decide the question of whether the facts or opinions are reasonably reliable; and (2) restrict the amount of inadmissible data on which experts may rely. *Id.* at 1324.

The district court excluded portions of the expert reports, holding that experts may not reasonably rely on untrustworthy materials. The experts submitted affidavits stating that the data on which they relied was generally relied upon by experts in their fields. The court rejected the statements, choosing to formulate a set of judicial standards for determining the reasonableness of expert reliance. Applying its new standards, the court determined that the expert opinions were inadmissible. *Id.* at 1379-80.

The Third Circuit reversed. See *In re Japanese Elec. Prods. Antitrust Litig.*, 723

restrictive view requires a trial court to decide whether the data are reasonably relied on by other experts in the field *and* determine the trustworthiness of the data.<sup>182</sup> Under either approach experts must disclose the bases for their opinions, for only then can trial courts determine whether the experts' reliance is reasonable.<sup>183</sup>

Rule 703 allows experts to rely on facts or data that are inadmissible in evidence.<sup>184</sup> More specifically, Rule 703 permits expert witnesses to rely on hearsay to support their opinions, so long as it is reasonable for experts in the field to do so.<sup>185</sup> Trial courts remain obligated to determine whether an expert's

F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986). The appellate court disagreed with an independent judicial test of reasonable reliance under Rule 703. "The proper inquiry is not what the court deems reliable, but what experts in the relevant discipline deem it to be." *Id.* at 276. The district court misinterpreted Rule 703 by placing its opinion of reasonable reliance before that of the experts. The Third Circuit explained that under Rule 703 there is broad foundation for expert opinion based on what *experts* deem reliable. Once a court determines that the data is reasonably relied upon in the subject field, rigorous inquiry into trustworthiness should be left for cross-examination. *Id.* at 277.

182. The more restrictive Rule 703 approach is exemplified by *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987). In "*Agent Orange*," Vietnam veterans and their families sued the manufacturers of the herbicide Agent Orange, alleging that exposure to the chemical caused injury and death. The defendants asserted that Agent Orange was not causally connected to the various claimed injuries. To support their claims on the difficult causation issue, the plaintiffs offered their medical experts' affidavits, which were based on anecdotal information, hearsay, and checklists of symptoms and medical histories provided by plaintiffs' counsel. *Id.* at 1230-39.

The "*Agent Orange*" court believed that Rule 703 required it to examine the reliability of experts' sources. *Id.* at 1244. The court concluded that the opinions lacked sufficient bases under any degree of scrutiny, noting that "no reputable physician relies on hearsay checklists [prepared] by litigants to reach a conclusion with respect to the cause of their afflictions." *Id.* at 1246. The opinions were further flawed because the experts relied on inapposite literature and failed to consider critical epidemiologic studies and other possible causes of disease. *See id.* at 1250-53. Accordingly, the court excluded the opinions and entered summary judgment for the defendants. *Id.* at 1256, 1264.

183. *Ambrosini v. Labarraque*, 966 F.2d 1464, 1469 (D.C. Cir. 1992).

184. The second sentence of Rule 703 provides: "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence.*" FED. R. EVID. 703 (emphasis added).

185. *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142 (9th Cir. 1997); *First Nat'l Bank of Louisville v. Lustig*, 96 F.3d 1554, 1576 (5th Cir. 1996) ("Experts may rely on hearsay evidence in forming their opinions."); *Marcel v. Placid Oil Co.*, 11 F.3d 563, 567 n.6 (5th Cir. 1994); *United States v. Farley*, 992 F.2d 1122, 1125

reliance on particular facts or data is reasonable.<sup>186</sup> If the proponent cannot establish that it was reasonable for the expert to rely on the hearsay being attacked, the court should exclude the expert's testimony.<sup>187</sup>

Courts presume that experts properly evaluate hearsay and give it appropriate probative weight when forming their opinions.<sup>188</sup> Foundational hearsay may come as documents, data from unrelated studies, witness statements, or simple conversations with other experts. Rule 703 thus appears to create a "back door" exception to the general prohibition of hearsay. Fortunately, Rule 703's back door does not open wide.

The fact that an expert's opinion is premised on inadmissible evidence does not make that evidence admissible for other purposes.<sup>189</sup> A party cannot use hearsay relied on by an expert witness to prove the truth of the matters contained in the inadmissible evidence.<sup>190</sup> A party cannot sneak in otherwise inadmissible hearsay through an expert witness if the expert did not rely on the evidence when forming his opinions.<sup>191</sup> For example, a plaintiff who needs to introduce documents to prove his case, but cannot lay the foundation for the documents, cannot cure his evidentiary problems simply by making the documents part of an expert's file. *Pelster v. Ray*<sup>192</sup> illustrates Rule 703's hearsay limits.

In *Pelster*, plaintiffs Vernon and Michelle Pelster alleged that two individual defendants rolled back the odometer on a car they purchased. The Pelsters also sued Earl and Joyce Morton for passing the rolled-back car through their business, South Central Auto Auction.<sup>193</sup> At trial, the Pelsters called a state investigator, Tom Ley, as an expert witness. The trial court allowed Ley to testify that the odometers had been rolled back on at least four other cars while

(10th Cir. 1993) (apparently assuming expert's reliance was reasonable); *South Cent. Petroleum, Inc. v. Long Bros. Oil Co.*, 974 F.2d 1015, 1019 (8th Cir. 1992); *Kingsley Assocs., Inc. v. Del-Met, Inc.*, 918 F.2d 1277, 1286-87 (6th Cir. 1990); *Doctor's Hosp., Inc. v. Southeast Med. Alliance, Inc.*, 878 F. Supp. 884, 886 (E.D. La. 1995); *Jobin v. Resolution Trust Corp.*, 160 Bankr. 161, 172 (D. Colo. 1993).

186. *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 682 (3d Cir. 1991).

187. See, e.g., *Redman v. John D. Brush & Co.*, 111 F.3d 1174, 1179 (4th Cir. 1997); *Cummins v. Lyle Indus.*, 93 F.3d 362, 371-72 (7th Cir. 1996); *United States v. Gaskell*, 985 F.2d 1056, 1060-62 (11th Cir. 1993) (also relying on Rule 403); *Gong v. Hirsch*, 913 F.2d 1269, 1272-73 (7th Cir. 1990).

188. *United States v. Locascio*, 6 F.3d 924, 938 (2d Cir. 1993).

189. *Boone v. Moore*, 980 F.2d 539, 542 (8th Cir. 1992); *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992).

190. *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728 (6th Cir. 1994); see, e.g., *Finchum v. Ford Motor Co.*, 57 F.3d 526, 531-32 (7th Cir. 1995).

191. See, e.g., *Hutchinson v. Groskin*, 927 F.2d 722, 725-26 (2d Cir. 1991); *Blue Cross & Blue Shield v. W.R. Grace & Co.*, 781 F. Supp. 420, 427 (D.S.C. 1991).

192. 987 F.2d 514 (8th Cir. 1993).

193. *Id.* at 516.



they were in South Central's possession. The Pelsters offered this "similar acts" evidence to prove that the Mortons knew that they were auctioning rolled-back cars, and that they intended their customers to rely on false mileage representations.<sup>194</sup> Ley also testified that of the 350 South Central vehicles he examined in his investigation, 300 had their odometers rolled back when they went through South Central. He also testified that South Central sold 204 more cars than U.S. Wholesales, a separate business, rolled back.<sup>195</sup>

Ley obtained his information from numerous sources, including automobile owners, dealers, auctioneers, state agencies, and a confidential informant.<sup>196</sup> Ley presumably relied on these sources to support his conclusion that the odometers were rolled back on 300 of the 350 cars South Central auctioned during his investigation. Similarly, he based his conclusion that South Central sold 204 cars rolled back by U.S. Wholesales on these sources.<sup>197</sup>

The *Pelster* court found that Ley's testimony was inadmissible hearsay.

[I]n order to prove that the Mortons knew that U.S. Wholesales was selling rolled-back cars through South Central or that they intended to defraud subsequent purchasers through a common plan, the Pelsters must first show that U.S. Wholesales was, in fact, selling rolled-back cars through South Central. To make that intermediate showing, they must initially prove that, at some point before the cars passed through South Central, the mileage reading on the cars' odometers had decreased by comparing the readings on the two dates. *If the Pelsters did not offer the out-of-court statements upon which Ley relied to prove the truth of those mileage figures, then the Pelsters cannot prove the first proposition in their evidentiary chain (that an initial mileage reading was higher than a subsequent reading).*<sup>198</sup>

Consequently, the Pelsters could never support an inference that the Mortons knew of the alleged fraud.<sup>199</sup>

Unfortunately, the distinction between permitting jurors to receive hearsay for the limited purpose of explaining an expert's opinion versus admitting the evidence to prove the truth of the data or information is subtle. Attorneys who elicit experts' supporting data or information before juries on direct examination typically do so without fear of limiting instructions. If trial lawyers are disturbed

---

194. *Id.* at 518.

195. *Id.* at 518-19.

196. *Id.* at 525.

197. *Id.*

198. *Id.* (emphasis added).

199. *Id.*

by their adversaries' use of Rule 703 as a means of persuading jurors, and they should be, such concern at least teaches that Rule 703 is a useful trial weapon for two reasons. First, it allows experts to base their opinions on inadmissible data. Second, it allows a party to effectively present inadmissible evidence to the jury in the guise of foundation.<sup>200</sup>

Another Rule 703 problem meriting consideration is an expert witness' reliance on the opinions of other experts. In other words, does Rule 703 permit an expert witness to base his opinions in part on the opinions of experts in other fields, or on the opinions of other experts in the same field? If the other experts on whose opinions the challenged expert relies also testify in the same case, the answer probably is yes.<sup>201</sup> If the other experts do not testify, the answer probably is no.<sup>202</sup> In the latter situation, the expert's opponent is subjected to the testimony of an expert he cannot cross-examine.<sup>203</sup> The problem worsens if the testifying expert is unfamiliar with the absent expert's methodology, because such unfamiliarity virtually precludes any assessment of the absent expert's work through the testifying expert's cross-examination.<sup>204</sup> Not only is the opponent deprived of meaningful cross-examination, such use of a second expert's testimony makes the testifying expert a vehicle or conduit for circumventing the prohibition of hearsay.<sup>205</sup>

The fact that a testifying expert relied on another expert's report does not make that report admissible; such a report is hearsay and it lacks the guarantee of trustworthiness that should accompany expert testimony.<sup>206</sup> Rule 703 does not permit the simple transmission of hearsay; it only permits experts to base their

---

200. See FAUST F. ROSSI, EVIDENCE FOR THE TRIAL LAWYER 160-61 (Nat'l Practice Inst. 1995) (discussing Rule 703's limits and its relationship with Rule 403 in such situations).

201. See, e.g., *Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1422, 1435-37 (W.D.N.Y. 1993), *rev'd on other grounds*, 34 F.3d 114 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995); *United States v. 1,014.16 Acres of Land*, 558 F. Supp. 1238, 1241-42 (W.D. Mo. 1983), *aff'd*, 739 F.2d 1371 (8th Cir. 1984).

202. *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1143-44 (4th Cir. 1994); *TK-7 Corp. v. Estate of Barbouti*, 993 F.2d 722, 732-33 (10th Cir. 1993).

203. *Tran Trong Cuong*, 18 F.3d at 1143.

204. *TK-7 Corp.*, 993 F.2d at 732.

205. See *id.* at 732-733 (citing *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992)). A few courts in those states with Rule 703 equivalents have reached similar conclusions. See, e.g., *C.S.I. Chem. Sales, Inc. v. MAPCO Gas Prods., Inc.*, 557 N.W.2d 528, 531 (Iowa Ct. App. 1996); *Bruflat v. Mister Guy, Inc.*, 933 S.W.2d 829, 833 (Mo. Ct. App. 1996); *Primavera v. Celotex Corp.*, 608 A.2d 515, 521 (Pa. Super. Ct. 1992), *appeal denied*, 622 A.2d 1374 (Pa. 1993); *Todd v. Williams*, 409 S.E.2d 450, 451-52 (Va. 1991).

206. *Polythane Sys., Inc. v. Marina Ventures Int'l, Ltd.*, 993 F.2d 1201, 1207-08 (5th Cir.), *reh'g denied*, 4 F.3d 992 (1993), *cert. denied*, 510 U.S. 1116 (1994).

opinions on hearsay under certain circumstances. Moreover, another expert's report specifically prepared for purposes of litigation does not, by definition, constitute facts or data of a type reasonably relied upon by experts in any particular field.<sup>207</sup>

Rule 703 clearly does not permit a testifying expert to bolster his opinions by relying on the work of other experts.<sup>208</sup> A testifying expert cannot rely on the work of another expert in the field and then bolster his opinions or enhance his credibility by stating that the expert on whose work he relied agrees with him.<sup>209</sup>

What is really at stake in many Rule 703 and Rule 705 disputes is the division of labor among the various players at trial.<sup>210</sup> In the Rule 703 context, trial judges must decide whether evidence "is substantively reliable proof of a fact in issue, and further whether the jury is likely to misuse the [evidence] as proof of another fact."<sup>211</sup> Courts should freely give limiting instructions to prevent potential evidentiary abuses. In all instances the burden of calling attention to flawed bases for experts' opinions falls squarely on trial lawyers.<sup>212</sup> If an expert describes the bases for his opinions in accordance with Rule 703, opposing counsel must timely and incisively object on direct examination and further attack the expert's foundation on cross-examination. If the expert testifies in conformity with Rule 705, opposing counsel must cross-examine the expert so effectively that the trial court is compelled to strike the expert's testimony.

#### *D. The Overlap Between Rules 702 and 703*

Because Rules 702 and 703 are closely intertwined, and because they lack specificity, courts may approach essentially identical evidentiary problems under either Rule. This is especially true when a party challenges the foundation for an expert's opinions. Expert testimony may be attacked for insufficient foundation under Rule 702 because, absent proper foundation, the expert's intended testimony will not assist the trier of fact.<sup>213</sup> Expert testimony also may

207. *Tran Trong Cuong*, 18 F.3d at 1143.

208. *Id.*

209. *Id.*

210. See Edward J. Imwinkelreid, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 MERCER L. REV. 447, 479-80 (1996) (discussing Rule 703 and division of labor among jury, judge and expert witness).

211. *Id.* at 479.

212. See *Smith v. Ford Motor Co.*, 626 F.2d 784, 793 (10th Cir. 1980) (quoting Michael H. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L.F. 895, 897), *cert. denied*, 450 U.S. 918 (1981).

213. See *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 272 (3d Cir. 1991); *see*,

be excluded under Rule 703, which speaks to the facts or data on which experts base their opinions.<sup>214</sup> A lack of foundation is sometimes fatal. Without adequate foundation for their experts' opinions plaintiffs may not be able to establish causation.<sup>215</sup> Expert witnesses cannot render opinions based on speculation and conjecture.<sup>216</sup>

Challenges to the foundation for experts' opinions are not easily mounted. Although experts may not ground their opinions in speculation and conjecture, neither must their factual bases be so firm that they can testify with absolute certainty.<sup>217</sup> There is a vast gray area between these extremes. The best that can be said is that experts must base their opinions on facts sufficient to support reasonably accurate conclusions.<sup>218</sup> Perhaps because this standard is so elusive,

*e.g.*, *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21-22 (2d Cir. 1996) (expert's testimony as to plaintiff's lost future earnings excluded as speculative under Rule 702); *Ansick v. Hillenbrand Indus., Inc.*, 933 F. Supp. 773, 780-81 (S.D. Ind. 1996) (expert arguably not qualified and no foundation for conclusions and opinions in affidavit).

214. *See, e.g.*, *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 827-28 (5th Cir. 1993), *cert. denied sub nom. Cooper v. Armstrong Rubber Co.*, 570 U.S. 1117 (1994) *Brown v. Parker-Hannifin Corp.*, 919 F.2d 308, 311 (5th Cir. 1990).

215. *See, e.g.*, *Buckner v. Sam's Club, Inc.*, 75 F.3d 290, 294 (7th Cir. 1996) (expert affidavit opposing summary judgment); *Vadala v. Teledyne Indus., Inc.*, 44 F.3d 36, 38-39 (1st Cir. 1995); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 92 (1st Cir. 1993) (affidavit opposing summary judgment), *cert. denied*, 511 U.S. 1126 (1994).

216. *Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 F.3d 69, 75 (3d Cir. 1996); *Guillory v. Domtar Indus., Inc.*, 95 F.3d 1320, 1331 (5th Cir. 1996); *In re Air Disaster at Lockerbie Scotland*, 37 F.3d 804, 824 (2d Cir. 1994), *cert. denied sub nom. Pan American World Airways, Inc. v. Pagnucco*, 115 S. Ct. 934 (1995); *Tyger Constr. Co. v. Pensacola Constr. Co.*, 29 F.3d 137, 142 (4th Cir. 1994), *cert. denied*, 573 U.S. 1080 (1995); *Cella v. United States*, 998 F.2d 418, 423 (7th Cir. 1993); *see, e.g.*, *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194, 198-99 (5th Cir. 1996) (toxicologists' background information concerning plaintiff's chemical exposure was "so sadly lacking as to be mere guesswork"); *Buckner*, 75 F.3d at 293-94 (expert's conclusion in affidavit was "conjecture" and was "wholly without evidentiary support"); *Trevino v. Gates*, 99 F.3d 911, 922-23 (9th Cir. 1996) (experts' assumptions concerning future income were unfounded), *cert. denied*, 117 S. Ct. 1249 (1997); *CMI, Inc. v. Intoximeters, Inc.*, 918 F. Supp. 1068, 1078-79 (W.D. Ky. 1995) (rejecting economist's testimony on lost sales because, lacking foundation, his opinions were "sheer speculation"), *appeal dismissed*, 95 F.3d 1168 (Fed. Cir. 1996); *Collier v. Varco-Pruden Bldgs.*, 911 F. Supp. 189, 191-92 (D.S.C. 1995) (rejecting construction expert's opinion based on speculation); *Henry v. Hess Oil Virgin Islands Corp.*, 163 F.R.D. 237, 246-47 (D.V.I. 1995) (rejecting expert economist's opinion based on second expert's "unfounded conclusions").

217. *Kieffer v. Weston Land, Inc.*, 90 F.3d 1496, 1499 (10th Cir. 1996) (quoting *Jones v. Otis Elevator Co.*, 861 F.2d 655, 662 (11th Cir. 1988)).

218. *Id.*

the majority view is that foundational weaknesses go to the weight to be afforded the expert's testimony, and not to its admissibility.<sup>219</sup>

### *E. Federal Rule of Evidence 403*

Rule 403 expressly recognizes trial courts' broad control over the admission of evidence. The Rule applies to all forms of evidence, whether demonstrative, documentary or testimonial. Under Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."<sup>220</sup> The "unfair prejudice" to be weighed is the prejudice to the party against whom the evidence is offered—not the prejudice the offering party will experience if the evidence is not admitted.<sup>221</sup>

Because all material evidence is inherently prejudicial, only "unfair" prejudice will compel the exclusion of otherwise admissible evidence.<sup>222</sup> "Unfair

219. See *Hose v. Chicago N.W. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995) (stating that only exception to this general rule is where expert's opinion is so fundamentally unsupported that it cannot assist the jury); *Gomez v. Martin Marrietta Corp.*, 50 F.3d 1511, 1519 (10th Cir. 1995); *Sparks v. Gilley Trucking Co.*, 992 F.2d 50, 54 (4th Cir. 1993); *Concise Oil & Gas P'ship v. Louisiana Intrastate Gas Corp.*, 986 F.2d 1463, 1476 (5th Cir.), *reh'g denied*, 990 F.2d 1254 (1993); *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir. 1993); see, e.g., *Tuman v. Genesis Assocs.*, 935 F. Supp. 1375, 1385-86 (E.D. Pa. 1996).

220. FED. R. EVID. 403.

221. *LaPlante v. American Honda Motor Co.*, 27 F.3d 731, 740 (1st Cir. 1994). While it seems strange to have to make so obvious a point, courts sometimes are confused on this issue. See, e.g., *Bilal v. Lockhart*, 993 F.2d 643, 644 n.2 (8th Cir.) (trial judge suggested that evidence's probative value had to be balanced against unfair prejudice to the offering party were evidence not admitted), *cert. denied*, 510 U.S. 924 (1993).

222. See *Graef v. Chemical Leaman Corp.*, 106 F.3d 112, 118 (5th Cir. 1997) ("Evidence is not prejudicial merely because admitting it may sway the jury against a party."); *Sutkiewicz v. Monroe County Sheriff*, 110 F.3d 352, 360 (6th Cir. 1997); *United States v. Hahn*, 17 F.3d 502, 509-10 (1st Cir. 1994); *United States v. Munoz*, 36 F.3d 1229, 1232-33 (1st Cir. 1994) (quoting *United States v. Moreno Morales*, 815 F.2d 725, 740 (1st Cir. 1987)), *cert. denied*, *Martinez* 115 S. Ct. 1164 (1995); *United States v. Sutton*, 970 F.2d 1001, 1007-08 (1st Cir. 1992); *United States v. Harvey*, 959 F.2d 1371, 1374 (7th Cir. 1992); *United States v. Noland*, 960 F.2d 1384, 1386-87 (8th Cir. 1992) ("[Rule 403] does not protect against evidence that is prejudicial merely in the sense that it is detrimental to a party's case.") (quoting *United States v. Michaels*, 726 F.2d 1307, 1315 (8th Cir.), *cert. denied*, 469 U.S. 820 (1984)); *Durtsche v. American Colloid Co.*, 958 F.2d 1007, 1012 (10th Cir. 1992) (allegations of contamination at company facility were not unfairly prejudicial in a wrongful termination action since they

prejudice” means an “undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”<sup>223</sup> But even inflammatory evidence may be admissible depending on the context.<sup>224</sup> In order for a court to exclude evidence under Rule 403, the alleged unfair prejudice must *substantially* outweigh the evidence’s probative value.<sup>225</sup> “The truth may hurt, but Rule 403 does not make it inadmissible on that account.”<sup>226</sup>

Rule 403 serves a “general screening function for otherwise admissible evidence.”<sup>227</sup> The rule requires a trial court to balance the prejudicial effect of challenged evidence against its probative value before admitting the evidence.<sup>228</sup> The Rule 403 balancing test is applied after the challenged evidence passes muster under Rules 702 and 703.<sup>229</sup> The decision to exclude evidence under Rule 403 hinges on the facts of the particular case; generalizations cannot be made, and precedent is of relatively little value.<sup>230</sup> Rule 403 determinations are committed to trial courts’ discretion,<sup>231</sup> and appellate courts are reluctant to

established improper motive for firing the employee); *George v. Celotex Corp.*, 914 F.2d 26, 31 (2d Cir. 1990) (any prejudice derived from probative force of the evidence; thus, prejudice was not unfair).

223. *Firemen’s Fund Ins. Co. v. Thien*, 63 F.3d 754, 758 (8th Cir. 1995) (quoting *United States v. Dennis*, 625 F.2d 782, 796-97 (8th Cir. 1980)); *see also* *United States v. Doe*, 903 F.2d 16, 21 (D.C. Cir. 1990) (quoting Rule 403 advisory committee’s note).

224. *See, e.g., Cooley v. Carnike Cinemas, Inc.*, 25 F.3d 1325, 1330-32 (6th Cir. 1994) (CEO’s statements that he did not want to see his grandmother at Thanksgiving because she was old, and that older people “should be confined to a concentration camp” were admissible in age discrimination case).

225. *See Senra v. Cunningham*, 9 F.3d 168, 172 (1st Cir. 1993); *United States v. Medina*, 992 F.2d 573, 582-83 (6th Cir. 1993); *Corrigan v. Methodist Hosp.*, 874 F. Supp. 657, 658 (E.D. Pa. 1995).

226. *In re Air Crash Disaster*, 86 F.3d 498, 538 (6th Cir.), *aff’d*, 86 F.3d 498 (6th Cir. 1996).

227. *Christopherson v. Allied-Signal Corp.*, 939 F.2d 1106, 1112 (5th Cir. 1991).

228. *United States v. Pelullo*, 14 F.3d 881, 889 (3d Cir. 1994).

229. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993).

230. *In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1223, 1255 (E.D.N.Y. 1985), *aff’d*, 818 F.2d 187 (2d Cir. 1987), *cert. denied sub nom. Lombardi v. Dow Chemical Co.*, 487 U.S. 1234 (1988).

231. *United States v. Sinclair*, 74 F.3d 753, 757-58 (7th Cir. 1996); *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 752 n.6 (3d Cir. 1995); *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1190 (9th Cir. 1995); *Daigle v. Maine Med. Ctr., Inc.*, 14 F.3d 684, 690 (1st Cir. 1994); *Conway v. Icahn & Co.*, 16 F.3d 504, 511 (2d Cir. 1994); *Davis v. Odeco, Inc.*, 18 F.3d 1237, 1247 (5th Cir. 1994); *Joseph v. Terminix Int’l Co.*, 17 F.3d 1282, 1284 (10th Cir. 1994); *Bilal v. Lockhart*, 993 F.2d 643, 644 (8th Cir.), *cert. denied*, 510 U.S. 924 (1993); *Hurt v. Coyne Cylinder Co.*, 956 F.2d 1319, 1328 (6th Cir. 1992); *Wallace v. Mulholland*, 957 F.2d 333, 336 (7th Cir.), *cert. denied*, 506 U.S. 980 (1992); *Hancock v. Hobbs*, 967 F.2d 462, 467 (11th Cir. 1992).

reverse trial courts' decisions.<sup>232</sup> Trial courts tend to invoke Rule 403 sparingly, preferring to admit questionable evidence accompanied by a limiting instruction.<sup>233</sup>

In a recent criminal case, *Old Chief v. United States*,<sup>234</sup> the Supreme Court attempted to explain the appropriate balancing under Rule 403 when weighing alleged unfair prejudice against probative value. The issue in *Old Chief* was whether a criminal defendant can force the government to stipulate to an element of a crime in order to avoid related prejudice, or whether the government retains the right to present its own evidence.<sup>235</sup> More particularly, does a district court abuse its discretion by spurning a defendant's offer to stipulate when the government's insistence on proving the element of the crime raises the risk of a verdict tainted by improper consideration?<sup>236</sup> The Court held that it does.<sup>237</sup>

In deciding the narrow issue before it, the Court examined two basic alternatives with respect to Rule 403 balancing. First, an item of evidence "might be viewed as an island, with estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the danger substantially outweighs the value and whether the evidence ought to be excluded."<sup>238</sup> The Court rejected this alternative, reasoning that such an interpretation of Rule 403 would allow the proponent to structure the trial "in whatever way would produce the maximum unfair prejudice consistent with relevance."<sup>239</sup> The proponent could discard probative evidence with little

Courts' exercise of their Rule 403 discretion is limited to jury trials. In a bench trial, a court can hear relevant evidence, weigh its probative value, and reject improper inferences. *Schultz v. Butcher*, 24 F.3d 626, 631-32 (4th Cir. 1994); *see, e.g., United States v. Hall*, 969 F.2d 1102, 1109-10 (D.C. Cir. 1992).

232. *See Kelly v. Boeing Pet. Servs., Inc.*, 61 F.3d 350, 360 (5th Cir. 1995); *Berry v. Deloney*, 28 F.3d 604, 608 (7th Cir. 1994); *Newell Puerto Rico, Ltd. v. Rubbermaid Inc.*, 20 F.3d 15, 21 (1st Cir. 1994). For rare cases reversing trial courts' Rule 403 determinations, *see Sutkiewicz v. Monroe County Sheriff*, 110 F.3d 352, 360 (6th Cir. 1997), *Brock v. Caterpillar, Inc.*, 94 F.3d 220, 226 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1428 (1997), *Westcott v. Crinklaw*, 68 F.3d 1073, 1077-78 (8th Cir. 1995), and *Buscaglia v. United States*, 25 F.3d 530, 533-34 (7th Cir. 1994).

233. *See Montag v. Honda Motor Co.*, 75 F.3d 1414, 1420 (10th Cir.) (trial court did not err by admitting allegedly "inflammatory and misleading" videotape because it gave a limiting instruction), *cert. denied*, 177 S. Ct. 61 (1996); *United States v. Lasanta*, 978 F.2d 1300, 1307-08 (2d Cir. 1992) (evidence admissible under Rule 403 where district court gave limiting instruction).

234. 117 S. Ct. 644 (1997).

235. *See id.* at 646.

236. *Id.* at 647.

237. *Id.* at 647, 655-56.

238. *Id.* at 651.

239. *Id.* at 652.

prejudicial effect in favor of improperly influential evidence; the worst he would have to fear would be a ruling sustaining a Rule 403 objection, at which point he could fall back on the benign substitute evidence.<sup>240</sup> Rule 403 does not confer such autonomy on the party who stands to benefit from the evidentiary taint.<sup>241</sup>

Second, the question of admissibility under Rule 403 might invite further evidentiary comparisons to take account of the full evidentiary context of the case as the district court understands it when asked to rule.<sup>242</sup> This approach would require trial courts to first determine whether a particular item of evidence raises a specter of unfair prejudice.<sup>243</sup> But, unlike the first alternative, the court's analysis cannot stop there. The court must then go on to evaluate the degrees of probative value and unfair prejudice not only for the evidence in question, but also for "any actually available substitutes."<sup>244</sup> If alternative evidence carries equal probative weight with less prejudicial risk, the court should discount the value of the evidence first offered.<sup>245</sup> The court should then exclude the evidence if its *discounted* probative value is substantially outweighed by the danger of unfair prejudice.<sup>246</sup> A judge has to make these calculations "with an appreciation of the offering party's need for evidentiary richness and narrative integrity in presenting a case. . . ."<sup>247</sup>

The *Old Chief* court elected the second approach based on its reading of Rule 403's companions—Rule 401 and 404—and the related Advisory Committee Notes.<sup>248</sup> The probative value of an item of evidence under Rule 403 is distinct from its relevance under Rule 401,<sup>249</sup> and it may be determined by comparing evidentiary alternatives.<sup>250</sup> When Rule 403 confers judicial discretion by providing that evidence "may" be excluded, such discretion may be informed by more than assessing a particular piece of evidence's twin tendencies to prejudice and to prove.<sup>251</sup> A court's discretionary judgment may be informed by

240. *Id.*

241. *Id.*

242. *Id.* at 651.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* (emphasis added).

247. *Id.*

248. *Id.* at 652.

249. FED. R. EVID. 401. Rule 401 provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

250. *Old Chief*, 117 S. Ct. at 652.

251. *Id.*



going beyond that initial assessment to make like assessments of other evidence for purposes of comparison, and by examining evidentiary alternatives.<sup>252</sup>

*Old Chief* is unremarkable outside the criminal law context. Advocates have long offered courts evidentiary alternatives when arguing against the admission of potentially prejudicial evidence. Courts are routinely persuaded that, in light of available alternatives, challenged evidence should be weighed on a more sensitive scale. *Old Chief* merely articulates what good advocates and careful courts have done all along.

Expert testimony presents special problems.<sup>253</sup> Evidence delivered through an expert can be powerful and simultaneously very misleading because of the difficulty in evaluating it.<sup>254</sup> A trial court weighing possible prejudice against probative value under Rule 403 must therefore exercise more control over experts than over lay witnesses.<sup>255</sup>

Because Rule 403's application defies generalization, it is no surprise that courts have relied on Rule 403 to exclude expert testimony and scientific evidence in a variety of circumstances. In *Davidson v. Smith*,<sup>256</sup> the Second Circuit affirmed a district court's decision to exclude evidence of the plaintiff's psychiatric history.<sup>257</sup> The *Davidson* plaintiff had been confined in an institution for the criminally ill some 15 years prior to trial.<sup>258</sup>

The court in *Pivot Point International, Inc. v. Charlene Products, Inc.*,<sup>259</sup> refused to allow testimony "that large companies often sue small competitors."<sup>260</sup> Even if such a statement is properly expert testimony, which it is not, "whatever marginal relevance the testimony ha[d] would be swamped by its potential for distraction of the jury and undue prejudice. . . ."<sup>261</sup>

The *Bennett v. PRC Public Sector, Inc.*<sup>262</sup> court determined that the probative value of the expert's testimony was "eviscerated" because his conclusions were "untested and [were] based on unreliable information. . . ."<sup>263</sup>

252. *Id.*

253. See *United States v. Carswell*, 922 F.2d 876, 879 (D.C. Cir. 1991) ("[I]f a witness' expertise on a subject appears to be attenuated or questionable, then the trial court may conclude that the danger of prejudice merely from labeling him an 'expert' outweighs the possibility that his testimony would be helpful.").

254. Weinstein, *supra* note 8, at 632.

255. Weinstein, *supra* note 8, at 632.

256. 9 F.3d 4 (2d Cir. 1993).

257. *Id.* at 7.

258. *Id.*

259. 932 F. Supp. 220 (N.D. Ill. 1996).

260. *Id.* at 225.

261. *Id.*

262. 931 F. Supp. 484 (S.D. Tex. 1996).

263. *Id.* at 502-03.

As a result, the probative value of his testimony was "heavily outweighed by its prejudicial effect," and the admission of his testimony "would create a serious danger of confusing the issues or misleading the jury."<sup>264</sup> The *Bennett* court thus employed Rule 403 to preclude the expert's testimony.

In *United States v. Rincon*,<sup>265</sup> the Ninth Circuit affirmed a district court's exclusion of expert testimony on the psychological aspects of eyewitness identification. The *Rincon* court agreed with the district court that the proffered expert testimony would confuse and mislead the jury, thus rendering it more prejudicial than probative.<sup>266</sup>

In *Evans v. Mathis Funeral Home, Inc.*,<sup>267</sup> the court refused to allow a human factors expert to testify about the conditions contributing to the plaintiff's fall.<sup>268</sup> The *Evans* court concluded that because the subject of the expert's intended testimony was within jurors' common knowledge, the danger of prejudice outweighed the probative value of the expert testimony.<sup>269</sup>

The *Conti v. Commissioner*<sup>270</sup> plaintiffs voluntarily took polygraph tests without the Tax Court's or IRS counsel's knowledge to try and prove their cash hoard claim. The Tax Court held that the polygraph results were unreliable and refused to admit them.<sup>271</sup> The Tax Court also excluded the results under Rule 403.<sup>272</sup> The Sixth Circuit affirmed the Tax Court on the latter basis. The *Conti* court observed that the prejudicial effect of unilateral polygraph tests outweighs their probative value because the party offering them does not have an adverse interest at stake when taking the test.<sup>273</sup>

The Rule 403 standard a court applies is critical. The trial court in *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*<sup>274</sup> rejected two expert economists' testimony in an antitrust case. One basis for the trial court's decision was its application of Rule 403 to the economists' intended testimony. The trial court excluded the expert testimony under Rule 403 because it was "not

---

264. *Id.* at 503.

265. 984 F.2d 1003 (9th Cir. 1993).

266. *Id.* at 1006.

267. 996 F.2d 266 (11th Cir. 1993).

268. The expert intended to testify about the effect each of the following factors had in causing the plaintiff's fall: (1) uneven risers and treads on the subject stairs; (2) the fact that the patio and stairs were brick; (3) the height of the handrail on the stairs; and (4) the dim light. *Id.* at 268.

269. *Id.*

270. 39 F.3d 658 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1793 (1995).

271. *Id.* at 661.

272. *Id.* at 662.

273. *Id.* at 663.

274. 998 F.2d 1224 (3d Cir.), *cert. denied sub nom. Moyer Packing Co. v. Petruzzi's IGA Supermarkets, Inc.*, 510 U.S. 994 (1993).

more probative than prejudicial.<sup>275</sup> The Third Circuit reversed, noting that exclusion under Rule 403 requires that the probative value of the challenged evidence must be "substantially outweighed" by the rule's stated dangers.<sup>276</sup>

Relevant evidence may also be excluded under Rule 403 if it might confuse the issues or mislead the jury.<sup>277</sup> As with unfair prejudice, courts' determinations that evidence will potentially confuse the issues or mislead the jury turn on the facts of the particular case. It is impossible to identify particular factors or types of evidence uniformly warranting exclusion based on their potential to mislead or confuse.<sup>278</sup> As a general statement, it can probably be said that Rule 403 will

275. *Id.* at 1237.

276. *Id.* at 1239.

277. *See, e.g.,* Campbell v. Wood, 18 F.3d 662, 685-86 (9th Cir. 1994) (in death sentence case it was not error to exclude evidence of bungled hangings in other jurisdictions; other executions could not be reliably compared to protocol at issue); Monotype Corp. PLC v. International Typeface Corp., 43 F.3d 443, 449 (9th Cir. 1994) (in intellectual property case district court properly excluded testimony about industry moral code and copied typefaces; even were evidence relevant, it would confuse the jury); United States v. Brechtel, 997 F.2d 1108, 1113-14 (5th Cir.) (bank officer charged with improperly benefitting from transactions not allowed to elicit habit evidence to negate mental state required for conviction; chain of analogies required to ground relevance could have confused the jury), *cert. denied*, 510 U.S. 1013 (1993); International Surplus Lines Ins. Co. v. Fireman's Fund Ins. Co., 998 F.2d 504, 505-06, 508 (7th Cir. 1993); Jetcraft Corp. v. Flight Safety Int'l, 16 F.3d 362, 365 (10th Cir. 1993) (excluding evidence of FAA enforcement actions taken against defendants after airplane crash); United States v. Valencia, 957 F.2d 1189, 1194-96 (5th Cir.) (excluding foreign language tape that might confuse the issues or mislead the jury; effective limiting instruction could not be given), *cert. denied*, 506 U.S. 889 (1992); Bizzle v. McKesson Corp., 961 F.2d 719, 721-22 (8th Cir. 1992) (proper to exclude evidence of subsequent remedial measure in product liability case where evidence would likely confuse the jury); United States v. Waloke, 962 F.2d 824, 830 (8th Cir. 1992) (Rule 403 used to exclude evidence of specific instances of conduct because evidence was unfairly prejudicial, confusing and misleading, and would have created collateral mini-trials); Paradigm Sales, Inc. v. Weber Marking Sys., Inc., 880 F. Supp. 1247, 1252-53 (N.D. Ind. 1995) (expert testimony on irrelevant matters "would certainly confuse the issues" and was thus inadmissible under Rule 403); Tilton v. Capital Cities/ABC, Inc., 938 F. Supp. 751, 753 (N.D. Okla. 1995) (excluding expert linguist's proposed testimony about how certain rhetorical devices or speech patterns convey implied meanings because it would confuse the jury and it was "a waste of time"), *aff'd*, 95 F.3d 32 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 947 (1997).

278. Certain recurring situations do, however, give rise to claims of confusion or allegations that jurors will be misled. A listing and discussion of such situations may be found in JACK B. WEINSTEIN & MARGARET A. BERGER, 3 WEINSTEIN'S EVIDENCE ¶ 403[4], at 403-66 to 403-70 (1996) [hereinafter WEINSTEIN].

exclude as confusing or misleading that evidence which "might unduly distract the jury from the main issues" in the case.<sup>279</sup>

Finally, Rule 403 permits courts to exclude relevant evidence if its probative value is substantially outweighed by considerations of undue delay, waste of time, or the needless presentation of cumulative evidence.<sup>280</sup> Trial judges must have discretion to exclude cumulative evidence in order to try cases efficiently;<sup>281</sup> however, Rule 403 does not give courts license to exclude evidence that may delay trial without regard for its probative value. A trial court that excludes crucial evidence in the pursuit of efficiency or out of a need for expedience abuses its discretion.<sup>282</sup>

### *F. Federal Rule of Evidence 704*

Under the old "ultimate issue rule," expert witnesses were prohibited from offering opinions that would decide an issue.<sup>283</sup> This common law doctrine was based on the premise that an expert's opinion on ultimate facts "would invade the province of the jury."<sup>284</sup> In practice, however, neither the rule nor its rationale worked for a number of reasons: First, it was often impossible to separate ultimate facts from other facts; second, it was sometimes impossible for a witness to express his opinion in anything other than ultimate facts; third, the ultimate issue rule's rationale made little sense in light of the fact that experts cannot invade the jury's province because jurors are always free to draw their own conclusions; and, fourth, it was often impossible for courts to distinguish

279. MCCORMICK ON EVIDENCE § 185 (John W. Strong ed., 4th ed. 1992).

280. FED. R. EVID. 403.

281. *See* United States v. Briscoe, 896 F.2d 1476, 1504 (7th Cir.) (district court did not err by excluding evidence that "would have been an unwarranted waste of precious judicial time in . . . a long, protracted and tedious trial"), *cert. denied sub nom.* Usman v. United States, 498 U.S. 863 (1990).

282. *See, e.g.,* De Anda v. City of Long Beach, 7 F.3d 1418, 1423 (9th Cir. 1993) (by limiting witness' testimony, district court impaired plaintiff's ability to prove his civil rights claim); Zaken v. Boerer, 964 F.2d 1319, 1322-23 (2d Cir.) (testimony wrongly excluded under Rule 403), *cert. denied*, 506 U.S. 975 (1992); Secretary of Labor v. DeSisto, 929 F.2d 789, 794-96 (1st Cir. 1991) (trial court committed reversible error by limiting number of witnesses without balancing need for efficiency against negative consequences of excluding evidence; witness limitation "prevented both parties from presenting sufficient evidence on which to base a reliable judgment"); First Nat'l Bank & Trust Co. v. Hollingsworth, 931 F.2d 1295, 1304-05 (8th Cir. 1991) (harshly criticizing trial court's decision to bar defendant's testimony).

283. WEINSTEIN, *supra* note 278, ¶ 704[01], at 704-06 (quoting M.C. Slough, *Testamentary Capacity: Evidentiary Aspects*, 36 TEX. L. REV. 1, 14 (1957)).

284. *Id.*

between testimony on ultimate facts and legal conclusions.<sup>285</sup> More fundamentally, the ultimate issue rule deprived juries of the full benefit of expert witnesses' judgment.

The enactment of Federal Rule of Evidence 704 abolished the common law ultimate issue rule.<sup>286</sup> Rule 704 provides:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.<sup>287</sup>

The Rule 704(a) requirement that testimony on an ultimate issue be "otherwise admissible" means that expert testimony must be admissible under Rules 702, 703, 705 and 403.<sup>288</sup> In short, challenged expert testimony must clear a number of evidentiary hurdles before it is ever subject to attack under Rule 704. Rarely will any case be decided solely by application of Rule 704.<sup>289</sup> Rule 704 merely focuses courts' attention on whether "ultimate issue" testimony is otherwise admissible.<sup>290</sup>

Rule 704(a) is not particularly helpful when expert testimony is couched in terms of a legal standard. While fact-based conclusions are permissible, ultimate legal conclusions are not; unfortunately, the line between these two testimonial

---

285. *Id.* ¶ 704[01], at 704-706 to 704-07.

286. *United States v. Baskes*, 649 F.2d 471, 479 (7th Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981).

287. FED. R. EVID. 704.

288. *See generally* *United States v. Moore*, 997 F.2d 55, 57-58 (5th Cir. 1993) (observing that in order for expert testimony to be admissible under Rule 704, it must first satisfy Rules 701 and 702); *Wheeler v. John Deere Co.*, 935 F.2d 1090, 1100-01 (10th Cir. 1991) (expert testimony satisfied Rule 702); *United States v. Schatzle*, 901 F.2d 252, 257 (2d Cir. 1990) (noting applicability of Rules 702 and 403); *United States v. Cecil*, 836 F.2d 1431, 1441 (4th Cir.) (discussing Rules 701, 702, 703, 705 and 403 relative to Rule 704), *cert. denied*, 487 U.S. 1205 (1988); *Mathie v. Fries*, 935 F. Supp. 1284, 1295-96 (E.D.N.Y. 1996) (expert testimony on rape trauma syndrome was inadmissible under Rules 702 and 403, and therefore could not be admitted under Rule 704); *see also* FED. R. EVID. 704 advisory committee's note (describing interplay between Rules 701, 702 and 403, and Rule 704).

289. WEINSTEIN, *supra* note 278, ¶ 704 [02], at 704-10.

290. *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985).

categories is a fine one that depends on the circumstances of the case.<sup>291</sup> Courts are all over the board. For example, the *Heflin v. Stewart County*<sup>292</sup> court held that Rule 704(a) permitted a corrections expert to testify that the defendants were "deliberately indifferent" to an inmate's medical needs in a civil rights case.<sup>293</sup> In *Berry v. City of Detroit*,<sup>294</sup> the Sixth Circuit held that nearly identical testimony<sup>295</sup> constitutes an inadmissible legal conclusion.<sup>296</sup> In the products liability context, the court in *Strickland v. Royal Lubricant Co.*<sup>297</sup> refused to allow the plaintiff's expert witness to testify that a warning was "inadequate" as that term was defined under Alabama law.<sup>298</sup> The *Strickland* court reasoned that such testimony "would not be factual evidence but rather would constitute an attempt to instruct on the application of the law . . . and the legal implications of the defendant's conduct."<sup>299</sup> The *Strong v. E.I. DuPont de Nemours Co.*<sup>300</sup> court held that the plaintiff's expert engineer could not testify that the defendant's products were unreasonably dangerous. The *Strong* court accepted the district court's reasoning that the expert's opinion expressed inadequately explored legal criteria that would not assist the jury.<sup>301</sup> The Tenth Circuit, on the other hand, has freely admitted such testimony.<sup>302</sup>

Negligence cases also produce disparate holdings, even though an expert's expression of a party's negligence should clearly be inadmissible as a legal conclusion.<sup>303</sup> In *Neilson v. Armstrong Rubber Co.*,<sup>304</sup> the Eighth Circuit held

291. See *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1212 (D.C. Cir. 1997); *AUSA Life Ins. Co. v. Dwyer*, 899 F. Supp. 1200, 1202 (S.D.N.Y. 1995).

292. 958 F.2d 709 (6th Cir. 1992).

293. *Id.* at 714-16.

294. 25 F.3d 1342 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995).

295. The expert equated "gross negligence" with "deliberate indifference." The expert's use of the latter term particularly disturbed the court. *Id.* at 1353.

296. *Id.* at 1353-54.

297. 911 F. Supp. 1460 (M.D. Ala. 1995).

298. *Id.* at 1469.

299. *Id.*

300. 667 F.2d 682 (8th Cir. 1981).

301. *Id.* at 686.

302. *E.g.*, *Quinton v. Farmland Indus., Inc.*, 928 F.2d 335, 338 (10th Cir. 1991) (veterinarian allowed to opine that animal feed was unreasonably dangerous); *Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1459 (10th Cir. 1987) (expert allowed to testify that weed eater was "unreasonably dangerous beyond the expectation of the average user").

303. See, *e.g.*, *Andrews v. Metro N. Commuter R.R.*, 882 F.2d 705, 707-10 (2d Cir. 1989) (plaintiff's expert should not have been allowed to "testify[] bluntly that 'the railroad was negligent'"); *Shahid v. City of Detroit*, 889 F.2d 1543, 1547-48 (6th Cir. 1989) (plaintiff's expert not allowed to testify that police officers were negligent); *Hermitage Indus. v. Schwerman Trucking Co.*, 814 F. Supp. 484, 485-87 (D.S.C. 1993)

that an expert could testify that the defendant's manufacturing process caused the defect in a tire.<sup>305</sup> On the other side of the causation coin is *Owen v. Kerr-McGee Corp.*,<sup>306</sup> in which the Fifth Circuit held that a question asking an expert to opine as to the cause of a pipeline explosion impermissibly sought a legal conclusion.<sup>307</sup>

Despite the many confusing decisions that might seem to suggest otherwise, Rule 704(a) does not permit expert witnesses to state legal conclusions.<sup>308</sup> The rule was never intended to allow experts to offer opinions embodying legal conclusions.<sup>309</sup> The ultimate issues to which expert witnesses testify, therefore, must be fact issues.<sup>310</sup> A court's admission of legal conclusions or opinions is improper because such evidence or testimony threatens to usurp the jury's role as factfinder.<sup>311</sup>

Experts should not be allowed to use Rule 704 as a vehicle to attack the credibility of an opposing witness.<sup>312</sup> An expert cannot "pass judgment on a

(defendant's expert could not testify that plaintiff was negligent).

304. 570 F.2d 272 (8th Cir. 1978).

305. *Id.* at 276-77.

306. 698 F.2d 236 (5th Cir. 1983).

307. *Id.* at 239-40.

308. *Weston v. Washington Metro. Area Transit Auth.*, 78 F.3d 682, 684 n.4 (D.C. Cir.), *amended on reh'g*, 86 F.3d 216 (1996); *Snap-Drape, Inc. v. Commissioner*, 98 F.3d 194, 198 (5th Cir. 1996); *Crow Tribe of Indians v. Racicot*, 87 F.3d 1039, 1045 (9th Cir. 1996); *Berry v. City of Detroit*, 25 F.3d 1342, 1353-54 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995); *Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1993); *Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992); *Evans v. Independent Sch. Dist. No. 25*, 936 F.2d 472, 476 (10th Cir. 1991); *Parker v. Williams*, 855 F.2d 763, 777 (11th Cir. 1988); *see, e.g., State ex rel. Montgomery v. Louis Trauth Dairy, Inc.*, 925 F. Supp. 1247, 1254 (S.D. Ohio 1996) (refusing to allow experts to testify that defendants conspired to violate antitrust laws; any such testimony would embrace legal conclusions).

309. *United States v. Scop*, 846 F.2d 135, 139 (2d Cir.), *reh'g granted*, 856 F.2d 5 (1988).

310. *See Miksis v. Howard*, 106 F.3d 754, 761-62 (7th Cir. 1997) (allowing sleep deprivation expert to testify about driver fatigue as factual causation under Rule 704(a)); *Zuchel v. City of Denver*, 997 F.2d 730, 742-43 (10th Cir. 1993) (discussing police deadly force practices).

311. *See Yannacopoulos v. General Dynamics Corp.*, 75 F.3d 1298, 1301, 1302 (8th Cir. 1996) (excluding a letter containing "a conclusory statement of a legal opinion").

312. *See United States v. Azure*, 801 F.2d 336, 340 (8th Cir. 1986); *United States v. Samara*, 643 F.2d 701, 705 (10th Cir.), *cert. denied*, 454 U.S. 829 (1981). Neither the *Azure* court nor the *Samara* court expressly relied upon Rule 704 to reject the experts' testimony on credibility. *See Azure*, 801 F.2d at 340-41; *Samara*, 643 F.2d at 705.

witness' truthfulness in the guise of a professional opinion."<sup>313</sup> The determination of witnesses' credibility should be left strictly to the jury.<sup>314</sup>

At least one commentator suggests that the "very existence of Rule 704(b) implies that federal courts have misinterpreted Rule 704(a) by improperly excluding so-called impermissible legal conclusions."<sup>315</sup> Supposedly, the Rule 704(b) exclusion of expert testimony offered to show the defendant's state of mind directly related to the crime or defense at issue<sup>316</sup> in a criminal case is the only limitation on expert witnesses' expression of legal conclusions.<sup>317</sup> Rule 704(b) necessarily implies that only one exception (psychiatric testimony in criminal cases) exists to Rule 704(a)'s abrogation of the ultimate issue rule; were it otherwise, Rule 704(b) would be "unnecessary surplusage."<sup>318</sup>

Even if this restrictive view of Rule 704(a) is accurate, which is unclear, expert testimony in the form of legal conclusions is not necessarily admissible. Such an interpretation of Rule 704(a) ignores the fact that the rule is not exclusionary;<sup>319</sup> rather, it simply requires "ultimate issue" testimony to be "otherwise admissible." Opinions that are phrased in terms of "inadequately explored legal criteria" or that "merely tell the jury what result to reach" are inadmissible under Rules 702 and 403, and are thus inadmissible under Rule 704(a).<sup>320</sup> Rule 704(a) incorporates Rule 702's "helpfulness" requirement. Thus, expert testimony that is "unhelpful" because it merely states a legal conclusion, or because the expert simply tells the jury what result to reach, is routinely excluded.<sup>321</sup> If the expert is in no better position than a juror to reach the ultimate conclusion at issue, Rule 704 will not make the expert's opinion admissible.<sup>322</sup> An expert's statement of a legal conclusion is also inadmissible under Rule 702 because it is deemed to be outside the scope of the witness'

313. *Westcott v. Crinklaw*, 68 F.3d 1073, 1076 (8th Cir. 1995).

314. *See United States v. Cecil*, 836 F.2d 1431, 1441 (4th Cir.) (applying Rule 704 to psychiatric testimony), *cert. denied*, 487 U.S. 1205 (1988).

315. *Cook*, *supra* note 2, at 568.

316. *See* FED. R. EVID. 704(b).

317. *Cook*, *supra* note 2, at 568-69; *see also United States v. Di Domenico*, 985 F.2d 1159, 1163-64 (2d Cir. 1993) (describing Rule 704(b) as the "one salient exception" to Rule 704(a)'s abrogation of the common law ultimate issue rule).

318. *Cook*, *supra* note 2, at 569.

319. *United States v. Markum*, 4 F.3d 891, 895 (10th Cir. 1993) ("Rule 704(a) is a rule that allows expert testimony in, not one that keeps it out.").

320. *See United States v. Whitted*, 11 F.3d 782, 785 (8th Cir. 1993); *United States v. Allen*, 10 F.3d 405, 414 (7th Cir. 1993); FED. R. EVID. 704 advisory committee's note.

321. *See, e.g., Whitted*, 11 F.3d at 785-87; *Di Domenico*, 985 F.2d at 1163-64; *United States v. Simpson*, 7 F.3d 186, 188-89 (10th Cir. 1993).

322. *See Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992); *United States v. Benson*, 941 F.2d 598, 605 (7th Cir. 1991), *amended*, 957 F.2d 301 (7th Cir. 1992).



expertise.<sup>323</sup> Expert methodology that fails the scientific inquiry required by *Daubert*<sup>324</sup> should not support "ultimate issue" testimony under Rule 704(a). Experts should not be allowed to testify on ultimate issues that are scientifically unsupportable.<sup>325</sup> Finally, experts may not state legal conclusions because it is the trial court's duty to instruct the jury on the law.<sup>326</sup> Trial judges cannot effectively delegate that duty to expert witnesses by allowing experts to state legal conclusions.<sup>327</sup>

### G. Parting Thoughts

Proposed expert testimony raises two related issues: First, expert testimony may be inadmissible under any one or some combination of Rules 104(a), 702, 703, 704 and 403. Second, the proffered expert testimony must be sufficient to support a verdict for the proponent.<sup>328</sup> The exclusion or rejection of expert testimony may leave the proponent unable to prove its case. Even if the challenged evidence is ultimately ruled admissible, it may be legally insufficient to support the proponent's case.<sup>329</sup> Admissible expert testimony may not raise a genuine issue of material fact, thus exposing the proponent to summary judgment.<sup>330</sup> The admissibility and sufficiency of scientific evidence "necessitate different inquiries and involve different stakes."<sup>331</sup> When a party's case hangs in the balance, a court's evaluation of an expert's scientific methodology and reasoning "may require a more complex determination than

323. *Weston v. Washington Metro. Area Transit Auth.*, 78 F.3d 682, 684 n.4 (D.C. Cir.), *amended on reh'g*, 86 F.3d 216 (D.C. Cir. 1996).

324. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

325. *See, e.g., Gier v. Educational Serv. Unit No. 16*, 845 F. Supp. 1342, 1347-53 (D. Neb. 1994), *aff'd*, 66 F.3d 940 (8th Cir. 1995).

326. *In re Air Disaster at Lockerbie Scotland*, 37 F.3d 804, 826-27 (2d Cir. 1994), *cert. denied sub nom. Pan American World Airways, Inc., v. Pagnucco*, 111 S. Ct. 934 (1995); *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) (stating that "the court must be the jury's only source of law"); *Donnelly Corp. v. Gentex Corp.*, 918 F. Supp. 1126, 1137 (W.D. Mich. 1996).

327. *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1993), *cert. denied sub nom. Mariani v. United States*, 115 S. Ct. 939 (1995); *Molecular Tech. Corp. v. Valentine*, 925 F.2d 910, 919 (6th Cir. 1991).

328. William W. Schwarzer, *Management of Expert Evidence*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 29 (1994).

329. *Id.*

330. *See, e.g., Hammann v. United States*, 24 F.3d 976, 981-83 (7th Cir. 1994); *Maffei v. Northern Ins. Co.*, 12 F.3d 892, 897-900 (9th Cir. 1993).

331. *In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1132 (2d Cir. 1995).

that required when the judge merely has to ascertain the availability of evidence on an issue.”<sup>332</sup>

### III. EXPERT TESTIMONY AND THE FEDERAL RULES OF CIVIL PROCEDURE

Federal court practitioners must appreciate and understand the expert witness disclosure requirements imposed by Federal Rule of Civil Procedure 26. The 1993 amendments to Rule 26 make expert discovery particularly daunting. Rule 26(a)(2), entitled “Disclosure of Expert Testimony,” requires:

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph 2(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).<sup>333</sup>

---

332. Margaret A. Berger, *Evidentiary Framework*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 52 (1994).

333. FED. R. CIV. P. 26(a)(2).

A party is prohibited from deposing opposing experts before the experts provide their reports required by Rule 26(a)(2)(B).<sup>334</sup> With respect to the scope and limits of expert witness disclosure, Rule 26(b)(4)(B) provides:

A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.<sup>335</sup>

Rule 26(b)(4)(B) thus addresses discovery related to so-called "consulting experts."

Parties' compliance with the Rule 26(a) expert disclosure requirements is enforced by way of Rule 37. Rule 37(c)(1) provides:

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.<sup>336</sup>

Under Rule 37(a)(3), a party's evasive or incomplete Rule 26 disclosure is treated as a failure to disclose.<sup>337</sup>

Rule 37(c)(1) operates to automatically exclude witnesses and information that are not disclosed despite their required disclosure under Rule 26. Exclusion under Rule 37(c)(1) is "automatic" in the sense that an opposing party need not first move to compel disclosure.<sup>338</sup> This sanction was added to Rule 37 largely to "put teeth into" the Rule 26 mandatory disclosure requirements.<sup>339</sup>

---

334. FED. R. CIV. P. 26(b)(4)(A).

335. FED. R. CIV. P. 26(b)(4)(B).

336. FED. R. CIV. P. 37(c)(1).

337. FED. R. CIV. P. 37(a)(3).

338. 8A CHARLES ALAN WRIGHT & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2289.1 (1994).

339. 8A *Id.*

### *A. An Overview of the Rule 26 Disclosure Requirements and Their Effect*

Five particular Rule 26 topics merit discussion. These are: (1) the difference between opinions rendered under Federal Rules of Evidence 701 and 702, and the resulting effect on parties' disclosure obligations; (2) disclosing treating physicians' opinions; (3) the disclosure of rebuttal testimony versus impeachment evidence; (4) the disclosure of so-called "consulting experts"; and (5) work-product protection for communications between attorneys and expert witnesses.

#### 1. Rule 701 v. Rule 702 Opinions

Opinion testimony in federal courts is not limited to expert opinions. Lay witnesses may offer opinions in certain situations.<sup>340</sup> Federal Rule of Evidence 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.<sup>341</sup>

Rule 701 seeks to balance the trier of fact's need for relevant evidence against the danger of admitting unreliable testimony.<sup>342</sup>

Typical examples of the kind of opinion evidence contemplated by Rule 701 include a person's age, a person's anger or excitement, the value of one's own property, a person's intoxication, distance, sound, or the speed of a vehicle. Rule 701 allows lay witnesses to offer opinions where the facts could not otherwise be adequately described or explained for the jury so as to enable the jury to form an opinion or to reach an intelligent conclusion.<sup>343</sup> The scope of Rule 701 opinion testimony has begun to expand, however, with subtle

---

340. Stated most simply, lay witnesses may offer opinion testimony "if [their] opinions or inferences do not require any specialized knowledge and [can] be reached by any ordinary person." *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 460 (5th Cir. 1996).

341. FED. R. EVID. 701.

342. WEINSTEIN, *supra* note 27, ¶ 701[02], at 701-10.

343. *United States v. Yazzie*, 976 F.2d 1252, 1255 (9th Cir. 1992) (quoting *United States v. Skeet*, 665 F.2d 983, 985 (9th Cir. 1982)); *accord* *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347, 350 (8th Cir. 1994) (quoting *Kreuger v. State Farm Mut. Auto. Ins. Co.*, 707 F.2d 312, 317 (8th Cir. 1983)).

graduation toward allowing lay witnesses to enter expert territory.<sup>344</sup> It now appears that "a lay witness with first-hand knowledge *can* offer an opinion akin to expert testimony in most cases, so long as the trial judge determines that the witness possesses sufficient and relevant specialized knowledge or experience to offer the opinion."<sup>345</sup>

The issue with respect to Rule 26 disclosures is whether parties must disclose expert witnesses' opinions that properly fall within the ambit of Rule 701, instead of being governed by Rule 702. Rule 26(a)(2)(B) provides that an expert's report "shall contain a complete statement of *all opinions to be expressed*."<sup>346</sup> The Rule 26(a)(2)(B) mandate that "all opinions" an expert intends to express be disclosed could be construed to require the disclosure of simple Rule 701 opinions, as well as those opinions properly within Rule 702; however, that is debatable in light of the rule's structure.<sup>347</sup> Subdivision (a)(2)(B) incorporates Rule 26(a)(2)(A) by reference; subdivision (a)(2)(A) describes expert testimony subject to disclosure as that offered pursuant to Federal Rules of Evidence 702, 703 and 705.<sup>348</sup> Arguably, then, parties need only disclose expert opinions that fall within these three rules.<sup>349</sup> Moreover, both Rule 26(a)(2)(B) and the corresponding 1993 Advisory Committee Note repeatedly refer to "experts" and "expert testimony," further suggesting that an expert's Rule 701 opinions need not be disclosed.<sup>350</sup>

Some courts have held that undisclosed expert witnesses may nonetheless offer lay opinion testimony under Rule 701.<sup>351</sup> In *Hester v. CSX Transportation*,

---

344. See *Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1199 (3d Cir. 1995).

345. *Id.* at 1201-02. It is important to note that the *Asplundh* court went on to observe that Rule 701 opinion testimony of a technical nature must be subject to "some judicial gatekeeping" of the kind required by Rule 702. *Id.* at 1202. The court stated: "While we are careful not to suggest that *Daubert* applies to Rule 701, we believe that its spirit also counsels trial judges to carefully exercise a screening function with respect to Rule 701 opinion testimony when the lay opinion offered closely resembles expert testimony." *Id.*

There are key differences in the foundation requirements for expert witnesses' opinions and lay witnesses' opinions. While Rule 703 allows experts to base their opinions on inadmissible evidence, lay witnesses' opinions must be based on personal perceptions and "unavoidably, those perceptions must be of a type that are admissible in evidence." *Hartzell Mfg., Inc. v. American Chem. Tech., Inc.*, 899 F. Supp. 405, 408 n.2 (D. Minn. 1995).

346. FED. R. CIV. P. 26(a)(2)(B) (emphasis added).

347. Joseph, *supra* note 25, at 107.

348. FED. R. CIV. P. 26(a)(2)(A).

349. Joseph, *supra* note 25, at 107.

350. See *id.*

351. See, e.g., *United States ex rel. Jervis B. Webb Co. v. Gust K. Newberg Constr.*

*Inc.*,<sup>352</sup> for example, the Fifth Circuit affirmed a district court's decision to admit undisclosed expert testimony that certain photographs were "misleading" and "did not accurately depict the conditions" at a railroad crossing.<sup>353</sup> The *Hester* court reasoned that such testimony was admissible because the expert personally surveyed the crossing.<sup>354</sup> The court saw no problem with the testimony because "even a lay person may testify to the accuracy of a photograph of a scene that he has personally viewed."<sup>355</sup> The *DeBiasio v. Illinois Central Railroad*<sup>356</sup> court held that it was not error to allow an expert to testify about his handling of evidence, even though that testimony was not disclosed.<sup>357</sup> Because the witness was testifying about matters within his personal knowledge, he was not testifying as an expert. In short, his testimony as a fact witness "was separable from his testimony as an expert."<sup>358</sup>

Allowing expert witnesses to offer undisclosed opinions because the opinions fall under Rule 701 instead of Rule 702 runs contrary to courts' recent attempts to better control expert testimony. There are several compelling reasons for courts to reject the Rule 701/702 dichotomy. First, the line between Rule 701 testimony and Rule 702 testimony is often difficult to draw. Second, even if the line reasonably can be drawn, there is no valid reason to permit what amounts to surprise expert testimony. Surprise testimony is exactly what federal courts seek to avoid via the Rule 26 disclosure requirements. Third, attempting to distinguish between Rule 701 and Rule 702 opinions offered by expert witnesses encourages litigants to circumvent the disclosure required and the discovery permitted by the Federal Rules. A convenient label here or a fuzzy description there, and a party can avoid the sort of expert disclosure and discovery that Rule 26 contemplates. Courts should not condone such disingenuous practices. To the contrary, courts should actively combat such conduct by way of pretrial orders and careful scrutiny of expert testimony.

---

Co./F.H. Paschen Group, No. 93 C 5219, 1995 WL 383133, at \*2 (N.D. Ill. June 21, 1995).

352. 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996).

353. *Id.* at 388.

354. *Id.*

355. *Id.* The plaintiff—who opposed the expert's testimony—was further hurt by his inattentiveness at trial. When the defense tendered the expert as having expertise in the field of accident reconstruction "with the ability to analyze photographs," the plaintiff did not contemporaneously object. *Id.*

356. 52 F.3d 678 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 1040 (1996).

357. *Id.* at 686.

358. *Id.*

## 2. Disclosing Treating Physicians' Opinions

In personal injury actions, plaintiffs' treating physicians commonly offer what is surely expert testimony. Indeed, they are among the most regular witnesses with specialized knowledge in both federal and state courts. That being the case, must plaintiffs in federal cases disclose their treating physicians' intended testimony under Rule 26?

The 1993 Advisory Committee's Note to Rule 26 provides that treating physicians are not "employed or specially retained" to render expert testimony.<sup>359</sup> Accordingly, treating physicians can be deposed or may be called to testify at trial without the necessity of a written report satisfying Rule 26(a)(2)(B).<sup>360</sup> Those courts that have considered the issue have adopted the position stated in the Advisory Committee's Note.<sup>361</sup>

A party's ability not to disclose a treating physician as an expert under Rule 26(a)(2)(B) has its limits. To the extent the physician testifies only to the patient's care or treatment, the physician is not to be considered an expert even though he may offer classic expert testimony.<sup>362</sup> If, however, the physician's testimony extends beyond facts made known to him in the course of the patient's care and treatment, and the physician is employed or specially retained to offer opinion testimony, he is subject to Rule 26(a)(2)(B) disclosure.<sup>363</sup> The determining factor, then, is the scope of treating physicians' intended testimony.<sup>364</sup>

359. FED. R. CIV. P. 26 advisory committee's note.

360. *Id.*

361. *E.g.*, *Piper v. Harnischfeger Corp.*, 170 F.R.D. 173, 174-75 (D. Nev. 1997); *Harlow v. Eli Lilly & Co.*, No. 94 C 4840, 1995 WL 319728, at \*2-3 (N.D. Ill. May 25, 1995); *Wreath v. United States*, 161 F.R.D. 448, 449-50 (D. Kan. 1995).

362. *See Williams v. Rene*, 72 F.3d 1096, 1103-04 (3d Cir. 1995) (observing that treating physician is "an ordinary witness," citing Rule 26(b)(4) advisory committee's note for support); *Bucher v. Gainey Transp. Serv., Inc.*, 167 F.R.D. 387, 390 (M.D. Pa. 1996); *Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 350 (D. Colo. 1995) (treating physicians testifying about plaintiff's treatment and examination were "ordinary witnesses" and thus were not entitled to special compensation for deposition time and travel); *Wreath*, 161 F.R.D. at 450.

363. *Brown v. Best Foods*, 169 F.R.D. 385, 389 (N.D. Ala. 1996) (quoting cases); *Zarecki v. National R.R. Passenger Corp.*, 914 F. Supp. 1566, 1573 (N.D. Ill. 1996); *Wreath*, 161 F.R.D. at 450; *see also Widhelm v. Wal-Mart Stores, Inc.*, 162 F.R.D. 591, 594 (D. Neb. 1995) (physician need only expand testimony beyond treatment and reasonableness of medical bills to be deemed expert for Rule 26 purposes; no additional requirement as in *Zarecki* and *Wreath* that doctor be specially retained or employed).

364. *Patel v. Gayes*, 984 F.2d 214, 218 (7th Cir. 1993); *Thomas v. Consolidated Rail Corp.*, 169 F.R.D. 1, 2 (D. Mass. 1996); *Widhelm*, 162 F.R.D. at 594; *Wreath*, 161 F.R.D. at 450.

The current approach makes little sense. First, treating physicians do not testify at trial—or by way of videotaped deposition—for free. Treating physicians insist on payment for their time spent testifying and, since their testimony is unrelated to the medical care or treatment of their patients,<sup>365</sup> they are “retained or specially employed” to render what can only be expert testimony.<sup>366</sup> Any witness who will offer expert testimony under Federal Rule of Evidence 702, and who will receive remuneration different than statutory witness fees and allowances, is an expert witness “retained or specially employed” for Rule 26 purposes.<sup>367</sup> Second, as it stands now, a treating physician can offer expert opinions on complex issues such as causation without prior disclosure. For example, a treating pulmonologist might opine that a plaintiff’s chronic respiratory distress is attributable to a single incident of chemical exposure, even though that conclusion is not essential to the plaintiff’s care or treatment. Third, and as the foregoing causation example demonstrates, the line between expert medical testimony and treatment-based medical testimony is often blurred. For all of these reasons, courts should in their pretrial orders require parties to designate treating physicians as expert witnesses, rather than taking the unsatisfactory path leading from the Rule 26 Advisory Committee’s Note.

### 3. Rebuttal v. Impeachment Testimony

Under Rule 26(a)(2)(C), a party must disclose at least 90 days before trial or within 30 days of an adversary’s expert disclosure under Rule 26(a)(2)(B) any expert testimony “intended solely to contradict or rebut evidence on the same subject matter” disclosed by the opposing party.<sup>368</sup> A party need not disclose expert testimony to be presented at trial “solely for impeachment purposes” under Rule 26(a)(3).<sup>369</sup> The question thus becomes whether expert testimony or evidence is offered in rebuttal, or whether it is intended solely to impeach, with the answer determining parties’ disclosure obligations. Unfortunately, Rule 26

---

365. *But see Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 349 (D. Colo. 1995) (treating physicians’ opinions on causation based on patient’s examination are necessary part of patient’s treatment and do not make treating physicians experts for Rule 26 purposes); *Salas v. United States*, 165 F.R.D. 31, 33-34 (W.D.N.Y. 1995) (same).

366. *Cf. Steele v. Seglie*, Civ. A. No. 84-2200, 1986 WL 30765, at \*2-\*3 (D. Kan. Mar. 27, 1986) (treating physicians who prepared written reports for plaintiff for compensation were “employed or specially retained” in anticipation of litigation).

367. *Smith v. State Farm Fire & Cas. Co.*, 164 F.R.D. 49, 56 (S.D. W. Va. 1995).

368. FED. R. CIV. P. 26(a)(2)(C).

369. FED. R. CIV. P. 26(a)(3).



defines neither contradiction or rebuttal evidence, nor impeachment evidence, nor does it attempt to distinguish between them.<sup>370</sup>

The distinction between rebuttal expert testimony or evidence on the one hand, and impeachment evidence on the other, is critical. The failure to disclose in a timely manner rebuttal testimony under Rule 26(a)(2)(C) mandates exclusion of the evidence unless the nondisclosure was justified or harmless.<sup>371</sup> Nondisclosure in violation of Rule 26(a)(2)(C) probably is harmless where the objecting party has ample time to depose the rebuttal expert or to thoroughly discover the rebuttal evidence well in advance of trial.<sup>372</sup>

Rule 26(a)(2)(C) contemplates the designation of new expert witnesses to the extent they will offer true rebuttal evidence. The rule may not be used to supplement the opinions of experts timely disclosed under Rule 26(a)(2)(B); the use of the word "solely" in the second sentence of subdivision (a)(2)(C) in conjunction with the phrase "to contradict or rebut" clearly expresses this limitation. This interpretation of subdivision (a)(2)(C) is illustrated by *Fuller v. Volvo GM Heavy Truck Corp.*,<sup>373</sup> in which the court refused to allow the plaintiff to name a purported rebuttal witness. The *Fuller* court held that because the claimed rebuttal witness would, in fact, supplement the opinions of the plaintiff's lead expert disclosed earlier, the expert's designation under Rule 26(a)(2)(C) was both improper and untimely.<sup>374</sup> The plaintiff should have designated the expert as required by Rule 26(a)(2)(B) since his intended testimony was not true rebuttal evidence.<sup>375</sup>

While impeachment evidence need not be disclosed under Rule 26(a)(3),<sup>376</sup> its disclosure may still be required at trial courts' discretion. A trial court may always require the disclosure of impeachment evidence in a pretrial order.<sup>377</sup> Similarly, a judicial district is free to mandate the disclosure of impeachment evidence by way of local rule.<sup>378</sup>

370. Joseph, *supra* note 25, at 109.

371. *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230-31 (7th Cir. 1996).

372. *See, e.g., Dixon v. Certainteed Corp.*, 168 F.R.D. 51, 55 (D. Kan. 1996) (plaintiff's designation was untimely but six months remained before trial; thus, untimely disclosure was harmless).

373. No. 92 C 1797, 1995 WL 489542 (N.D. Ill. Aug. 10, 1995).

374. *Id.* at \*2.

375. *Id.*

376. *See DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678, 686 (7th Cir. 1995) (district court erred in excluding impeachment witness testifying as expert and evidence offered to impeach should not have been excluded; however, error was harmless), *cert. denied*, 116 S. Ct. 1040 (1996).

377. FED. R. CIV. P. 26 advisory committee's note.

378. *Id.* Local court rules are valid so long as they do not conflict with the Federal Rules of Civil Procedure. *See Marshall v. Gates*, 44 F.3d 722, 724 (9th Cir. 1995); *Carver v. Bunch*, 946 F.2d 451, 453 (6th Cir. 1991). Valid local rules bind the parties.

#### 4. The Disclosure and Discovery of "Consulting Experts"

It is not unusual for a party to retain an expert to testify at trial only to learn that the expert will render an unfavorable opinion.<sup>379</sup> Similarly, a party may not be able to call an intended expert witness at trial for practical or strategic reasons.<sup>380</sup> Counsel anticipating or embroiled in litigation also may retain or specially employ an expert without any expectation or intent that the expert will testify at trial. Experts who function behind the scenes as consultants are often of great benefit in shaping strategy, in crafting arguments or defenses, or in formulating attacks on opposing experts' opinions. This last category of witnesses truly may be described as "consulting experts," although attorneys sometimes attempt to classify experts falling in the first two categories as consulting experts.<sup>381</sup>

The key question is whether parties must identify their consulting experts. A logical reading of Rule 26 suggests that they must. Rule 26(a)(1)(A) requires parties to disclose "each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings."<sup>382</sup> Consulting experts certainly fall into this category of witnesses. The analysis does not stop there, however. Rule 26(b)(4)(B) provides:

A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of trial and who is not expected to be called as a witness, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.<sup>383</sup>

---

*See Silberstein v. IRS*, 16 F.3d 858, 860 (8th Cir. 1994). Requiring parties to disclose impeachment testimony would not conflict with Rule 26(a)(3) because the rule does not preclude the disclosure of impeachment evidence, and because such a local rule would honor the general intent of Rule 26(a). The Advisory Committee even mentioned such expansion of subdivision (a)(3). FED. R. CIV. P. 26 advisory committee's note ("By its terms, rule 26(a)(3) does not require disclosure of evidence to be used solely for impeachment purposes; however, [such] disclosure . . . may be required by local rule . . .").

379. Bryan W. Smith, *How to Prevent the Discovery of Opinions Held by Nontestifying Experts*, J. KAN. TRIAL LAW. ASS'N, Mar. 1996, at 16, 16.

380. *Id.*

381. *See id.*

382. FED. R. CIV. P. 26(a)(1)(A).

383. FED. R. CIV. P. 26(b)(4)(B). Rule 35(b) deals with plaintiffs' ability to obtain reports prepared by medical professionals who examine them at defendants' request, i.e., reports of independent medical examinations. FED. R. CIV. P. 35(b). Because Rule 35(b) has no application here, it will not be discussed further. For a case discussing Rules

The purpose of Rule 26(b)(4)(B) is to "prohibit a party from building its own case through the use of an opponent's financial resources and diligence."<sup>384</sup>

Nothing in the language of Rule 26(b)(4)(B) suggests that so-called consulting experts—nontestifying experts who are retained or specially employed in anticipation of litigation—are exempt from the Rule 26 disclosure requirements. The rule permits discovery of consulting experts' opinions "upon a showing of exceptional circumstances."<sup>385</sup> In order for a party to establish for a court the exceptional circumstances required for discovery under subsection (b)(4)(B), the opposing party from which discovery is sought must necessarily identify its consulting experts. Absent such disclosure, it is practically impossible for parties to ask courts to make Rule 26(b)(4)(B) determinations.<sup>386</sup> Certainly, a party served with an interrogatory calling for the identification of all persons with information or knowledge relating to any matter alleged in the action must identify its consulting experts in response.<sup>387</sup>

The fact that a party is required to disclose its consulting experts does not mean that those experts' opinions are automatically discoverable. The discovering party must still demonstrate that there are exceptional circumstances justifying inquiry into the consulting experts' knowledge or opinions.<sup>388</sup> Instances of exceptional circumstances justifying discovery under subsection (b)(4)(B) are rare.<sup>389</sup> The proper procedure is for a party to disclose its consulting experts under Rule 26(a)(1)(A) or to identify them in response to a proper interrogatory propounded under Rule 26(b)(1), and then promptly move for a protective order under Rule 26(c) if necessary.<sup>390</sup>

---

26(b)(4)(B) and 35, see *Crowe v. Nivison*, 145 F.R.D. 657 (D. Md. 1993) (allowing plaintiff to depose insurer's doctor who examined her before suit was filed; defendant unsuccessfully argued that doctor was a consulting expert).

384. *In re Interco Inc.*, 146 B.R. 447, 449 (Bankr. E.D. Mo. 1992).

385. FED. R. CIV. P. 26(b)(4)(B).

386. Of course, a litigant might accidentally discover a consulting expert's identity. See, e.g., *Healy v. Counts*, 100 F.R.D. 493, 496-97 (D. Colo. 1984).

387. *Baki v. B.F. Diamond Constr. Co.*, 71 F.R.D. 179, 181-82 (D. Md. 1976) (relying on FED. R. CIV. P. 26(b)(1)).

388. See *Queens Univ. v. Kinedyne Corp.*, 161 F.R.D. 443, 447-48 (D. Kan. 1995) (discovery not permitted where no showing of exceptional circumstances); *Shipes v. BIC Corp.*, 154 F.R.D. 301, 308-09 (M.D. Ga. 1994) (same); *Ross v. Burlington N. R.R.*, 136 F.R.D. 638, 639 (N.D. Ill. 1991) (same).

389. *Dominguez v. Syntex Lab., Inc.*, 149 F.R.D. 158, 163 (S.D. Ind. 1993); see also *Brown v. Ringstad*, 142 F.R.D. 461, 463 (S.D. Iowa 1992) (party seeking discovery "carries a heavy burden in demonstrating the existence of exceptional circumstances"); *State Auto Ins. Cos. v. Briley*, 140 F.R.D. 394, 397 (E.D. Mo. 1992) (same).

390. FED. R. CIV. P. 26(c). Rule 26(c) permits a party to seek an order that discovery not be had, or that the scope of discovery be limited. *Id.*

Litigants should not view the simple designation of someone as a "consulting expert" as a shield against unfavorable discovery. An expert who renders a damaging opinion cannot be stripped of his testifying expert designation and spared from deposition by reclassification as a consulting expert.<sup>391</sup> A party should not be allowed to rely on consulting expert designations to shield from discovery those experts whose opinions were rejected as the party shopped for an expert whose trial testimony would be advantageous.<sup>392</sup>

Rule 26(a)(1) requires the disclosure of consulting experts' identities, Rule 26(b)(4)(B) states how and when their opinions may be discovered, and Rule 26(c) provides a means by which the party employing a consulting expert may resist discovery. If nothing else, decisions handed down since the 1993 amendments to Rule 26 make clear that parties must play by the rules. While the opinions consulting experts hold enjoy some protection, the experts themselves are not immune from disclosure, nor is the discovery of their knowledge or opinions automatically off limits.

## 5. The Work-Product Doctrine and Communications Between Attorneys and Expert Witnesses

In order for expert witnesses to assist the parties employing them, they must be provided with a variety of materials and information about the case. It falls to the parties to provide their experts with much of the foundation for their opinions. "Communications between counsel and expert are essential to the understanding and proper functioning of both, and are therefore crucial to the prosecution or defense of a case."<sup>393</sup> Because litigants must ensure that their

---

The Tenth Circuit rejected this approach in *Ager v. Janè C. Stormont Hospital & Training School for Nurses*, 622 F.2d 496 (10th Cir. 1980). The *Ager* court held that the identity of consulting experts, as well as their opinions, can be discovered only in accordance with Rule 35, or upon a showing of exceptional circumstances. *Id.* at 503. Thus, while a party must categorically disclose its consulting experts, it need not specifically identify them (e.g., by name). *Queens Univ.*, 161 F.R.D. at 447. This approach makes little sense, however, since it requires parties to speculate about the identity of their opponents' consulting experts. It also threatens to foster unnecessary motion practice that might be avoided if parties knew the identity of their opponents' consulting experts, thus allowing them to make considered decisions about related potential discovery.

391. See *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61, 63 (D.N.M. 1996). But see *In re Vestavia Assocs. Ltd. Partnership*, 105 B.R. 680, 681 (Bankr. M.D. Fla. 1989) ("It is within [party's] prerogative to withdraw the [expert] witness and by its strategy limit [the opponent's] discovery.").

392. See, e.g., *Coates v. AC & S, Inc.*, 133 F.R.D. 109, 110-11 (E.D. La. 1990).

393. Joseph, *supra* note 25, at 101.

experts understand the relevant issues in the case,<sup>394</sup> attorneys may share with their experts documents concerning the attorneys' analysis of the case.<sup>395</sup> In other words, attorneys may share their work product with their expert witnesses.

The work product doctrine is both broader than and distinct from the attorney-client privilege.<sup>396</sup> The work product doctrine protects lawyers' effective trial preparation by immunizing certain materials from discovery.<sup>397</sup> The work product doctrine traces its roots to *Hickman v. Taylor*,<sup>398</sup> in which the Supreme Court sought to foreclose unwarranted inquiries into attorneys' files and mental impressions in the guise of liberal discovery.<sup>399</sup>

There are two categories or types of attorney work product.<sup>400</sup> The first of these is commonly known as "fact" or "ordinary" work product, but is better described as "tangible" work product.<sup>401</sup> Tangible work product includes such documents as memoranda, notes, witness statements, deposition summaries and the like. To qualify as tangible work product, the material sought to be protected must be a document or thing prepared in anticipation of litigation by or for a party, or by or for the party's representative.<sup>402</sup> The work product doctrine does not protect from discovery facts concerning the creation of work product or facts contained within work product, nor does the doctrine foreclose inquiry into the

---

394. Michael E. Plunkett, Comment, *Discoverability of Attorney Work Product Reviewed by Expert Witnesses: Have the 1993 Revisions to the Federal Rules of Civil Procedure Changed Anything?*, 69 TEMPLE L. REV. 451, 451 (1996).

395. See Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773, 773 (1994).

396. See *Hickman v. Taylor*, 329 U.S. 495, 508-14 (1947); *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1515 (D.C. Cir. 1993) (scope of protection under work product doctrine is broader than that attorney-client privilege affords); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929 (N.D. Cal. 1976) ("The work product doctrine is an independent source of immunity from discovery, separate and distinct from the attorney-client privilege.").

397. *Handgards*, 413 F. Supp. at 930.

398. 329 U.S. 495 (1947).

399. *Id.* at 510.

400. *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 139 F.R.D. 556, 557 (D. Mass. 1991); *United States v. Pepper's Steel & Alloys, Inc.*, 132 F.R.D. 695, 697 (S.D. Fla. 1990).

401. See FED. R. CIV. P. 26(b)(3) (discussing discovery of documents and *tangible things* prepared in anticipation of litigation or for trial) (emphasis added).

402. *Burton v. R.J. Reynolds Tobacco Co.*, 167 F.R.D. 134, 139 (D. Kan. 1996); *Pacamor Bearings, Inc. v. Minebea Co.*, 918 F. Supp. 491, 512 (D.N.H. 1996); *Sackman v. Liggett Group, Inc.*, 920 F. Supp. 357, 366 (E.D.N.Y. 1996); *Vermont Gas Sys., Inc. v. United States Fidelity & Guar. Co.*, 151 F.R.D. 268, 275 (D. Vt. 1993).

mere fact of an investigation.<sup>403</sup> Facts gathered from documents by a party's representative do not constitute tangible work product.<sup>404</sup>

"Opinion" or "core" work product, sometimes termed "intangible" work product,<sup>405</sup> refers to an attorney's mental impressions, conclusions, opinions or legal theories concerning the subject litigation.<sup>406</sup> Documents, or handwritten notes on documents, may constitute opinion work product if they reflect an attorney's mental impressions, conclusions, opinions or legal theories.<sup>407</sup>

In federal courts, the work product doctrine formulated in *Hickman v. Taylor*<sup>408</sup> is now substantially codified in Federal Rule of Civil Procedure 26(b)(3).<sup>409</sup> The rule provides in pertinent part:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.<sup>410</sup>

Under Rule 26(b)(3), tangible work product is discoverable only where the party seeking discovery demonstrates both substantial need for the materials and that it would suffer undue hardship were it required to procure substantially equivalent materials some other way.<sup>411</sup> As the second sentence of Rule 26(b)(3)

403. *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995).

404. *Pepper's Steel*, 132 F.R.D. at 697.

405. See, e.g., *State ex rel. Atchison, Topeka & Santa Fe Ry. v. O'Malley*, 898 S.W.2d 550, 552 (Mo. 1995).

406. See Cynthia B. Feagan, Comment, *Issues of Waiver in Multiple-Party Litigation: The Attorney-Client Privilege and the Work Product Doctrine*, 61 UMKC L. REV. 757, 778 (1993).

407. *Snowden v. Connaught Labs., Inc.*, 137 F.R.D. 325, 332 (D. Kan. 1991).

408. 329 U.S. 495 (1947).

409. *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 592 (3d Cir. 1984). Some courts hold that *Hickman* and not Rule 26(b)(3) governs the discovery of opinion work product. See, e.g., *United States v. One Tract of Real Prop.*, 95 F.3d 422, 428 n.10 (6th Cir. 1996). In other words, Rule 26(b)(3) may not have entirely subsumed *Hickman*.

410. FED. R. CIV. P. 26(b)(3).

411. *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976 (7th Cir. 1996); *In re Grand Jury Proceedings*, 33 F.3d 342, 348 (4th Cir. 1994).

makes clear, opinion work product enjoys greater protection.<sup>412</sup> The discovery of opinion work product requires something more than a showing of substantial need and the inability to obtain the equivalent without undue hardship.<sup>413</sup> While some courts have held that opinion work product is absolutely immune from discovery,<sup>414</sup> that is not the position taken by the Supreme Court,<sup>415</sup> and several courts have rejected such unqualified protection.<sup>416</sup> Even so, opinion work product is discoverable "only in very rare and extraordinary circumstances."<sup>417</sup>

A critical issue is whether a party waives work product protection by providing materials that would otherwise be immune from discovery to a

412. FED. R. CIV. P. 26(b)(3) ("In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal opinions of an attorney or other representative of a party concerning the litigation.") (emphasis added).

413. *Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981).

414. See, e.g., *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 983-84 (4th Cir. 1992); *Toledo Edison Co. v. G A Techs., Inc.*, 847 F.2d 335, 340 (6th Cir. 1988).

415. See *Upjohn Co.*, 449 U.S. at 401-02 ("While we are not prepared at this juncture to say that [opinion work product] is always protected . . . , we think a far stronger showing of necessity and unavailability . . . would be necessary to compel discovery.").

416. See, e.g., *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1422 (11th Cir.) (crime-fraud exception makes opinion work product discoverable), *modified on reh'g*, 30 F.3d 1347 (1994); *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (opinion work product may be discovered when mental impressions are at issue in a case and the discovering party's need for the material is compelling); *Frazier v. Southeastern Pa. Transp. Auth.*, 161 F.R.D. 309, 319 (E.D. Pa. 1995) (in civil rights case, plaintiff's need for opinion work product concerning surveillance of her in earlier suit by defendant was compelling; discovery ordered).

417. *Cox*, 17 F.3d at 1422 (quoting *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977)); see also *In re Allen*, 106 F.3d 582, 607 (4th Cir. 1997) (stating that "opinion work product 'enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances'" (quoting *In re Grand Jury Proceedings*, 33 F.3d 342, 348 (4th Cir. 1994)); *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 683 (S.D. Cal. 1996) (opinion work product discoverable "only in rare and extraordinary circumstances"); *Washington Bancorp. v. Said*, 145 F.R.D. 274, 276 (D.D.C. 1992) (opinion work product "receives almost absolute protection from discovery" and must be produced only where party seeking discovery demonstrates "'extraordinary justification'" (quoting *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982)). Whatever heightened standard of protection may apply to opinion work product, that level of protection is not triggered "unless disclosure creates a real, nonspeculative danger of revealing the lawyer's thoughts." *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1015 (1st Cir. 1988).

testifying expert.<sup>418</sup> Prior to the 1993 amendments to Rule 26, courts were split on this issue. Some courts held that such disclosure did not waive work product immunity,<sup>419</sup> while other courts, relying on Federal Rule of Evidence 612,<sup>420</sup> held that the disclosure of work product to an expert witness exposed those materials to discovery.<sup>421</sup> Still other courts deemed the work product doctrine waived in such situations without regard for Rule 612.<sup>422</sup> Discovery of work product provided to an expert may enhance reliability in the fact-finding process by ensuring that the expert will testify independently, rather than merely parroting counsel's views, and by guarding against more subtle means of influencing an expert's testimony.<sup>423</sup>

Following the 1993 amendments to Rule 26, the discoverability of communications between attorneys and expert witnesses must be analyzed in light of the Rule 26(a)(2)(B) mandate that an expert's report completely state "the data or other information" the expert considered in forming his opinions,<sup>424</sup> and the Rule 26(b)(3) protection of attorney work product.<sup>425</sup> Rule 26(a)(2)(B) does nothing to clear up the confusion surrounding the discoverability of work product revealed to an expert; if anything, that subsection amplifies the problem and makes the conflict within Rule 26 more explicit.<sup>426</sup>

Rule 26(a)(2)(B) standing alone makes any tangible work product given to an expert discoverable. The lingering question is what effect the rule has on opinion work product. Nothing in the rule suggests that it abrogates opinion work product protection and it should not be so construed. An attorney's mental impressions cannot constitute "data or other information" within the meaning of Rule 26(a)(2)(B). "Data" and "information" connote subjects that are factual in

418. "Work product immunity can be waived by disclosures which are inconsistent with the adversary system." *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 951 F. Supp. 679, 689 (W.D. Mich. 1996) (citing *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)).

419. *See, e.g., Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 593 (3d Cir. 1984).

420. Rule 612 provides that if a witness uses a writing to refresh his memory for the purpose of testifying either while testifying or before testifying, "an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness." FED. R. EVID. 612.

421. *See, e.g., James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144-46 (D. Del. 1982); *Wheeling-Pittsburgh Steel Corp. v. Underwriters Labs., Inc.*, 81 F.R.D. 8, 9-11 (N.D. Ill. 1978).

422. *See, e.g., Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384 (N.D. Cal. 1991); *Boring v. Keller*, 97 F.R.D. 404 (D. Colo. 1983).

423. *Intermedics*, 139 F.R.D. at 395-96.

424. FED. R. CIV. P. 26 (a)(2)(B).

425. FED. R. CIV. P. 26(b)(3).

426. Mickus, *supra* note 395, at 777-78.



nature, not ephemeral like 'mental impressions, conclusions, opinions or legal theories' of the sort protected by Rule 26(b)(3).<sup>427</sup>

The discoverability of opinion work product shared with an expert is further muddled by the interplay between Rules 26(b)(3) and b(4). Rule 26(b)(3) distinguishes between tangible work product (first sentence) and opinion work product (second sentence),<sup>428</sup> while incorporating the subsection (b)(1) limitation that discoverable information is any matter not privileged.<sup>429</sup> Attorney work product does not constitute privileged material within the meaning of Rule 26(b)(1); rather, attorney work product enjoys qualified immunity from discovery.<sup>430</sup> "Privilege" and "qualified immunity" are not synonymous.

Courts have been reluctant to conclude that opinion work product protection is waived under the post-1993 version of Rule 26 when protected materials are shared with a testifying expert,<sup>431</sup> although the possibility of waiver is ever present.<sup>432</sup> The "interpretative wrinkle" concerning waiver lies in the first

427. Joseph, *supra* note 25, at 104.

428. See FED. R. CIV. P. 26(b)(3).

429. See FED. R. CIV. P. 26(b)(1).

430. *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 514 n.2 (5th Cir.) (attorney work product enjoys qualified immunity from discovery, but such materials are not "privileged" under Rule 26(b)(1) and thus beyond the scope of discovery), *reh'g denied*, 3 F.3d 123 (1993), *cert. denied*, 511 U.S. 1029 (1994); *Joiner v. Hercules, Inc.*, 169 F.R.D. 695, 698 (S.D. Ga. 1996); *Zarrillo v. Bulk Materials, Inc.*, 169 F.R.D. 254, 257 (N.D.N.Y. 1996) ("Rather than a privilege, the doctrine creates a form of qualified immunity from discovery for documents within its scope."); *EEOC v. HBE Corp.*, 157 F.R.D. 465, 467 (E.D. Mo. 1994) (work product doctrine accords a qualified immunity); *Diamond State Ins. Co. v. Rebel Oil Co.*, 157 F.R.D. 691, 698 (D. Nev. 1994) ("The work-product rule is not a privilege, but an immunity . . ."). Unfortunately, courts sometimes describe the discovery protection the work product doctrine affords as a "privilege." See, e.g., *United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 294 (1996); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D. Mich. 1995); *Fromson v. Anitec Printing Plates, Inc.*, 152 F.R.D. 2, 4 (D. Mass. 1993); *Vermont Gas Sys., Inc. v. United States Fidelity & Guar. Co.*, 151 F.R.D. 268, 275 (D. Vt. 1993). This sort of imprecise—indeed, inaccurate—language creates the potential for considerable confusion when analyzing discovery disputes under Rules 26(b)(1), 26(b)(3) and 26(b)(4).

431. See, e.g., *Blakey v. Continental Airlines, Inc.*, No. 93-2194 (WGB), 1995 WL 464477, at \*6-\*7 (D.N.J. June 16, 1995); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 294-97 (W.D. Mich. 1995); *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85, 87-88 (S.D. W. Va. 1995); *All W. Pet Supply Co. v. Hill's Pet Prods. Div.*, 152 F.R.D. 634, 638 (D. Kan. 1993).

432. See *B.F.C. Oil Refining, Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 63-67 (S.D.N.Y. 1997) (holding that opinion work product shared with expert is discoverable); *Hager v. Bluefield Reg'l Med. Ctr., Inc.*, 170 F.R.D. 70, 77-80 (D.D.C. 1997) (opinion work product held to be discoverable); *Furniture World, Inc. v. D.A.V.*

sentence to Rule 26(b)(3),<sup>433</sup> which provides that subsection (b)(3)'s work product protections are "subject to" the provisions of subsection (b)(4).<sup>434</sup> Rule 26(b)(4)(A) provides that "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial."<sup>435</sup>

The interplay between Rules 26(b)(3) and (b)(4)(A) was extensively analyzed in *Haworth, Inc. v. Herman Miller, Inc.*<sup>436</sup> In *Haworth*, the defendant deposed the plaintiff's trial expert and, during that deposition, inquired into certain product manuals that plaintiff's counsel gave the expert to review.<sup>437</sup> Plaintiff's counsel objected on the grounds that the work product doctrine protected the material from discovery. The Magistrate Judge handling the case granted the defendant's motion to compel the expert to testify about all of his communications with plaintiff's counsel.<sup>438</sup> The Magistrate Judge concluded that the discovery limitations in Rule 26(b)(3) did not apply to subsection (b)(4)(A), governing experts' depositions.<sup>439</sup> He supported his broad discovery ruling by referring to Rule 26(a)(2) and commentary.<sup>440</sup> The plaintiff then appealed to the district court.

The *Haworth* court first tackled the interplay between Rules 26(b)(3) and (b)(4)(A). The court observed that courts are split on whether the text of subsection (b)(3) is subject to any condition or different standard found in subsection (b)(4).<sup>441</sup> This split implies that counsel's opinion work product can be discovered through an expert witness even though Rule 26(b)(3) instructs courts to protect against the discovery of such material.<sup>442</sup> The court thus determined that a "considered review" of Rule 26 was required.<sup>443</sup>

---

Thrift Stores, Inc., 168 F.R.D. 61, 62 (D.N.M. 1996) (stating that all documents produced to a party's expert witness must be produced on request); *Georgou v. Fritzshall*, No. 93 C 997, 1996 WL 73592, at \*2-\*3 (N.D. Ill. Feb. 20, 1996) (parties must disclose all materials provided to their experts; court ordered production of attorney-client privileged materials possessed by expert); *Karn v. Rand*, 168 F.R.D. 633, 637-39 (N.D. Ind. 1996) (holding that Rule 26 mandates "disclosure of those materials reviewed by an expert witness"); *Rail Intermodal Specialists, Inc. v. General Elec. Capital Corp.*, 154 F.R.D. 218, 220-21 (N.D. Iowa 1994) (applying balancing test that could make opinion work product discoverable; court ultimately decided that balancing favored nondisclosure).

433. Joseph, *supra* note 25, at 105.

434. FED. R. CIV. P. 26(b)(3).

435. FED. R. CIV. P. 26(b)(4)(A).

436. 162 F.R.D. 289 (W.D. Mich. 1995).

437. *Id.* at 291.

438. *Id.*

439. *Id.* at 292.

440. *Id.*

441. *Id.*

442. *Id.* at 292-93.

443. *Id.* at 293.

The *Haworth* court reasoned that the "subject to" language in the first sentence of Rule 26(b)(3) governs the discovery of attorney work product absent a contrary standard in subsection (b)(4)(A).<sup>444</sup> While the court could find different standards for the discovery of tangible work product, it perceived no differing standard for the discovery of opinion work product.<sup>445</sup> After studying Rule 26 as amended in 1993, and earlier versions of Rule 26(b)(4) and related legislative history, the *Haworth* court could "find nothing in any version of subdivisions (b)(3) and (b)(4), or the committee notes, that suggest core work product was discoverable under subdivision (b)(4)."<sup>446</sup> The court thus concluded that the protection afforded opinion work product under *Hickman v. Taylor*<sup>447</sup> and Rule 26(b)(3) applies to discovery from experts.<sup>448</sup>

The court next examined Rule 26(a) and the related Advisory Committee Notes on which the Magistrate relied to bolster his decision that the plaintiff's work product was discoverable.<sup>449</sup> The *Haworth* court held that Rule 26(a)(2)(B) requires only that "all factual information considered by the expert must be disclosed in the [expert's] report."<sup>450</sup> The court further observed:

The whole of the Committee Notes make [sic] clear that attorneys should no longer be able to make work-product privilege arguments regarding materials containing facts or assemblages of facts because they are obligated to disclose all factual information on their own in a report rather than on motion of opposing counsel. Any failure to so disclose requires that the information may not be used at trial . . . . The new procedure simply eliminates the need to have a judge order redaction of core work product from material that contains discoverable facts and data.<sup>451</sup>

For the strong protection afforded opinion work product not to apply, Rule 26 would have to include clear and unambiguous language permitting discovery.<sup>452</sup> The *Haworth* court could find no such language in the rule.<sup>453</sup> The court therefore remanded the case to the Magistrate for further proceedings, with the plaintiff's opinion work product safe from discovery.<sup>454</sup>

---

444. *Id.*

445. *Id.*

446. *Id.* at 294.

447. 329 U.S. 495 (1947).

448. *Haworth*, 162 F.R.D. at 294.

449. *See id.*

450. *Id.* at 295; *accord* All W. Pet Supply Co. v. Hill's Pet Prods. Div., 152 F.R.D. 634, 639 n.9 (D. Kan. 1993).

451. *Haworth*, 162 F.R.D. at 295 (citation omitted).

452. *Id.* (citing *Hickman v. Taylor*, 329 U.S. 495, 514 (1947)).

453. *Id.*

454. *Id.* at 296-97.

*Haworth* is a well reasoned opinion.<sup>455</sup> The court fairly and logically read and applied Rules 26(a)(2)(B), (b)(3) and (b)(4). *Haworth* permits some inquiry into communications between experts and counsel,<sup>456</sup> thus guarding against the risk of the attorney unduly influencing the expert, while preserving the sanctity of attorneys' opinion work product. Additionally, the *Haworth* approach promotes efficiency in litigation by encouraging counsel and experts to communicate freely. Had the court abrogated the opinion work product doctrine, counsel and experts would be forced to speak hypothetically and otherwise obscure their communications in order to avoid discovery. This result would offend the very purpose of the Federal Rules of Civil Procedure, which are intended to maintain the quality of justice and improve the efficiency of dispute resolution.<sup>457</sup>

### B. Enforcing Expert Disclosure: Rule 37

Parties' compliance with the Rule 26 expert disclosure requirements is enforced by way of Rule 37(c)(1).<sup>458</sup> A party's failure to comply with Rule 26 when disclosing intended expert testimony can be disastrous. The danger, of course, is that the court will bar the expert's testimony altogether, or at least limit the expert's testimony.<sup>459</sup> In *Doe v. Johnson*,<sup>460</sup> for example, the Seventh Circuit

455. The *Haworth* approach has been criticized. See, e.g., *Karn v. Rand*, 168 F.R.D. 633, 639-40 (N.D. Ind. 1996) (criticizing *Haworth* and declining to follow it); *Plunkett*, *supra* note 394, at 478-79 n.247.

456. *Haworth*, 162 F.R.D. at 296.

457. *People v. Carter*, 678 F. Supp. 1484, 1486 (D. Colo. 1986).

458. Rule 37(c)(1) is fully set forth in the text accompanying *supra* note 336.

459. See, e.g., *Coastal Fuels, Inc. v. Caribbean Pet. Corp.*, 79 F.3d 182, 202-03 (1st Cir. 1996) (experts who were not timely disclosed not allowed to testify); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 569-73 (5th Cir. 1996) (striking experts whose reports were so incomplete and insubstantial that they did not satisfy trial court's discovery order); *Walsh v. McCain Foods Ltd.*, 81 F.3d 722, 727 (7th Cir. 1996) (expert limited to testimony in report and at deposition; expert disclosure never supplemented as required); *1st Source Bank v. First Resource Fed. Credit Union*, 167 F.R.D. 61, 66 (N.D. Ind. 1996) (precluding expert from testifying about subject merely listed in expert's report; listing subject is not the same as providing opinion and basis for opinion); *Upsher-Smith Labs., Inc. v. Mylan Labs., Inc.*, 944 F. Supp. 1411, 1440 (D. Minn. 1996) (striking experts whose "uninformative, boilerplate" reports "wholly fail[ed] to disclose, in any intelligible way, the facts and rationale . . . under[lying] the opinions expressed" therein); *Paradigm Sales, Inc. v. Weber Marking Sys., Inc.*, 880 F. Supp. 1247, 1252 (N.D. Ind. 1995) (expert not allowed to offer opinion that was not contained in his report); *China Resource Prods. (U.S.A.) Ltd. v. Fayda Int'l, Inc.*, 856 F. Supp. 856, 866-67 (D. Del. 1994) (expert who did not provide report not allowed to testify).

460. 52 F.3d 1448 (7th Cir. 1995).

affirmed the district court's preclusion of the plaintiff's undisclosed expert testimony even though defense counsel could have elicited the challenged opinions at the expert's deposition but failed to do so.<sup>461</sup> The *Doe* court held that the plaintiff had an affirmative duty to disclose the expert's opinions and that the defense could not be considered negligent because it failed to elicit related testimony.<sup>462</sup>

The plaintiff in *Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*<sup>463</sup> brought a wrongful death action following an automobile accident allegedly caused by a tire blowout. The district court entered a scheduling order that, with respect to the disclosure of expert testimony, substantially tracked the language of current Rule 26(a)(2)(B). At the time the court entered the scheduling order, Rule 26 did not include its current expert disclosure requirements.<sup>464</sup> The scheduling order required:

Each party shall disclose . . . any evidence that the party may present at trial under Rules 702, 703 or 705 of the Federal Rules of Evidence. This disclosure shall be in written affidavit form, prepared and signed by the witness and shall include a complete statement of all opinions to be expressed, and the basis and reasons therefor; the data or other information relied upon in forming such opinions; any exhibits to be used as a summary of or support for such opinions; the qualification of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding five (5) years.<sup>465</sup>

The plaintiff engaged as her expert H. Boulter Kelsey, Jr., a mechanical engineer. In response to the scheduling order, Kelsey submitted a very short affidavit, to which he attached a copy of his *curriculum vitae* (CV).<sup>466</sup> Neither Kelsey's affidavit nor his CV divulged any direct professional experience in tire manufacture or tire failure analysis.<sup>467</sup> In contrast, Uniroyal's expert submitted a five page affidavit detailing the foundation for his opinions, and his CV revealed extensive professional experience in tire manufacture.<sup>468</sup>

Defense counsel notified the plaintiff's attorney that Kelsey's affidavit did not comply with the scheduling order.<sup>469</sup> When Kelsey did not supplement his affidavit, Uniroyal deposed him. At his deposition, Kelsey testified that he did

---

461. *Id.* at 1464.

462. *Id.*

463. 47 F.3d 277 (8th Cir. 1995).

464. *Id.* at 284.

465. *Id.* at 281-82.

466. *Id.* at 282.

467. *Id.*

468. *Id.*

469. *Id.*

not consider himself an expert in rubber chemistry, tire design or tire manufacture; that he had no formal training in tire failure analysis; and that the knowledge on which he relied to reach his opinions bore no relationship to his employment history.<sup>470</sup> Kelsey testified that his purported knowledge about tire failure derived from his years as a competitive race car driver, combined with his mechanical engineering background.<sup>471</sup>

Uniroyal moved to exclude or limit Kelsey's testimony at trial, arguing that he was not qualified as an expert under Rule 702 and that his testimony would be more prejudicial than probative.<sup>472</sup> The district court ruled that Kelsey could testify, "but only as to the limited content of his affidavit and 'nothing else.'"<sup>473</sup>

The plaintiff attempted to call Kelsey as an expert at trial, and attempted to qualify him by inquiring about his experience with tire failures other than that contained in his affidavit or CV.<sup>474</sup> Uniroyal repeatedly objected to the plaintiff's attempts to so qualify Kelsey and the trial court sustained nearly all of the objections.<sup>475</sup> The plaintiff was thus unable to qualify Kelsey as an expert and the court did not permit him to state that the defendant's tire failed because of a manufacturing defect.<sup>476</sup> Uniroyal prevailed at trial and the plaintiff moved for a new trial, which the district court denied. In denying the plaintiff's motion, the district court ruled that the plaintiff had "flagrantly disregarded" the scheduling order's expert disclosure requirement.<sup>477</sup> The plaintiff then appealed.

The plaintiff argued on appeal that Kelsey was qualified as a tire failure expert by virtue of his practical experience and, thus, that the district court abused its discretion by excluding his testimony.<sup>478</sup> The appellate court bypassed the plaintiff's Rule 702 argument, focusing instead on her failure to comply with the scheduling order.<sup>479</sup>

The *Sylla-Sawdon* court determined that Kelsey's affidavit did not comply with the district court's scheduling order. The affidavit lacked the required

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.*

474. *Id.* at 283.

475. *Id.*

476. *Id.*

477. *Id.*

478. *Id.*

479. *Id.* The *Sylla-Sawdon* court observed: "[Plaintiff's] request essentially asks us to ignore her expert's cursory response to the district court's Scheduling Order, and this we decline to do. *Sylla-Sawdon* failed to qualify Kelsey as an expert because he did not abide by the scheduling order and Rule 26(a)(2)(B)." *Id.* The court went on to speculate "that plaintiff may have had difficulty qualifying Kelsey as an expert in tire failure analysis even if his pretrial submission had complied with the scheduling order." *Id.*

specificity and thus failed to give the defendant advance notice of Kelsey's testimony, without which Uniroyal could not prepare to meet his testimony at trial.<sup>480</sup> The *Sylla-Sawdon* court rejected the plaintiff's argument that Uniroyal's deposition of Kelsey excused her failure to comply with the scheduling order.<sup>481</sup> The court held:

The "sketchy and vague" nature of Kelsey's affidavit forced Uniroyal to depose Kelsey to determine his qualifications and the basis for his opinion. Consequently, the necessity of the deposition frustrated the purposes of the district court's scheduling order and today would likewise frustrate the purposes of Rule 26(a)(2)(B).<sup>482</sup>

Because Kelsey's affidavit and CV did not satisfy the requirements imposed by the district court's scheduling order, his intended trial testimony was properly precluded.<sup>483</sup>

A party's failure to disclose expert testimony as required by Rule 26 is not always fatal.<sup>484</sup> Rule 37(c)(1) contains two safe harbor provisions. Sanctions for failing to disclose required information are inappropriate if the challenged nondisclosure is "substantially justified," or if the nondisclosure is "harmless."<sup>485</sup> Related judicial determinations are fact driven,<sup>486</sup> but courts should be mindful that Rule 37 sanctions are a drastic remedy warranted only in rare cases.<sup>487</sup> In any event, whether Rule 26(a) violations are harmless or justified is a decision entrusted to district courts' broad discretion.<sup>488</sup>

---

480. *Id.* at 284.

481. *Id.*

482. *Id.*

483. *Id.*

484. *See, e.g.,* *Stevens v. Bangor & Aroostook R.R.*, 97 F.3d 594, 600-01 (1st Cir. 1996) (trial court did not abuse its discretion by allowing expert to testify based on information that was not timely disclosed where opposing party declined trial court's offer of a limiting instruction and did not request additional time to prepare for cross-examination).

485. *See* FED. R. CIV. P. 37(c)(1) ("A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence . . . any information or witness not so disclosed.").

486. Joseph, *supra* note 25, at 99.

487. *Hinton v. Patnaude*, 162 F.R.D. 435, 439 (N.D.N.Y. 1995) ("Imposition of sanctions under Rule 37 is a drastic remedy and should only be applied in those rare cases where a party's conduct represents flagrant bad faith and callous disregard of the Federal Rules of Civil Procedure.").

488. *Mid-America Tablewares, Inc. v. Mogi Trading Co.*, 100 F.3d 1353, 1363 (7th Cir. 1996).

Courts may consider a number of factors in determining whether a party's failure to make a required disclosure was substantially justified. A court may first wish to consider whether the party acted in bad faith in failing to disclose the witness or information.<sup>489</sup> Second, a court may consider whether the proponent was simply negligent in failing to make the disclosure.<sup>490</sup> This is arguably part of a court's inquiry into a party's alleged bad faith in failing to disclose required information; however, mere negligence (e.g., untimely disclosure without substantial justification) is unlikely to excuse nondisclosure.<sup>491</sup> Third, a court may evaluate whether conditions or claims have changed, or whether a disputed point is a surprise, such that the party alleged to have a duty to disclose had no way of knowing that the challenged disclosure should have been made. For example, the court in *Friends of Santa Fe County v. LAC Minerals, Inc.*<sup>492</sup> held that the defendants did not have a duty to disclose expert testimony on a point that the plaintiffs did not appear to contest.<sup>493</sup>

Similarly, courts may need to weigh several factors in order to determine whether a party's failure to disclose witnesses or information was harmless. First, and again, did the party attacked for nondisclosure act in bad faith?<sup>494</sup> Second, was the opponent prejudiced by the failure to disclose?<sup>495</sup> Undisclosed evidence should not be excluded if the opponent otherwise obtains the information in discovery, or if the opponent has independent knowledge of the information.<sup>496</sup> A failure to disclose required information may not be prejudicial

489. See, e.g., *Hinton*, 162 F.R.D. at 439-40 (because party was delayed by "good faith" motion practice, untimely expert witness reports were not excluded); 251 CPW Housing Ltd. v. Paragon Cable Manhattan, No. 93 Civ. 0944, 1995 WL 70675 (S.D.N.Y. Feb. 21, 1995) (experts stricken because plaintiffs did not take disclosure obligations seriously and willfully disobeyed Rule 26).

490. See, e.g., *Edward Lowe Indus., Inc. v. Oil-Dri Corp.*, No. 94 C 7568, 1995 WL 683769, at \*2-\*3 (N.D. Ill. Nov. 16, 1995) (omissions in expert's report were inadvertent and were promptly corrected; expert allowed to testify).

491. See, e.g., *Gem Realty Trust v. First Nat'l Bank*, No. 93-606-SD, 1995 WL 127825, at \*5 (D.N.H. Mar. 20, 1995).

492. 892 F. Supp. 1333 (D.N.M. 1995).

493. *Id.* at 1351.

494. *Bronk v. Ineichen*, 54 F.3d 425, 432 (7th Cir. 1995); see, e.g., *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156 (3d Cir. 1995) (no reason to believe that defendant acted in bad faith; nondisclosure was harmless); *Hinton v. Patnaude*, 162 F.R.D. 435, 439-40 (N.D.N.Y. 1995) (harmless because no bad faith).

495. See *Nguyen v. IBP, Inc.* 162 F.R.D. 675, 680 (D. Kan. 1995) (failure to comply with Rule 26 disclosure requirements "is harmless when there is no prejudice to the party entitled to the disclosure").

496. See, e.g., *Farmland Indus., Inc. v. Morrison-Quirk Grain Corp.*, 54 F.3d 478, 482 (8th Cir. 1995) (opponent learned experts' undisclosed opinions at deposition); *Watts v. Healthydyne, Inc.*, Civ. A. No. 94-2195-BEO, 1995 WL 409022, at \*1-\*2



because of timing. For example, in *Apel v. Rockwell International Digital Communications Division*,<sup>497</sup> the court found that the defendant was not prejudiced by the plaintiff's inadequate expert disclosure because no trial date had been set, and it had ample time to depose the expert and to designate its own expert.<sup>498</sup> The court in *ABB Air Preheater, Inc. v. Regenerative Environmental Equipment Co.*<sup>499</sup> refused to preclude expert testimony allegedly disclosed late because there was "ample time to cure any alleged defect given the lack of a trial date . . . ."<sup>500</sup> Additionally, the defendant, whose untimely expert disclosure was challenged, did not oppose the plaintiff's supplementation of its expert disclosures in response.<sup>501</sup> Third, has the opponent negligently or intentionally turned a blind eye to the subject nondisclosure?<sup>502</sup> Fourth, what is the impact of the failure to disclose?<sup>503</sup>

Undisclosed witnesses may still be allowed to testify, or undisclosed evidence may still be introduced, even in the absence of substantial justification or where the opposing party is harmed by the nondisclosure. Notwithstanding the language of Rule 37(c), a district court abuses its discretion if the exclusion of evidence "results in fundamental unfairness in the trial of the case."<sup>504</sup> The "fundamental unfairness" standard articulated in *Orjias v. Stevenson*<sup>505</sup> is so

(D. Kan. June 29, 1995) (both parties failed to disclose commonly known witness; sanctions inappropriate); *American Tel. & Tel. Co. v. Shared Communication Servs., Inc.*, No. 93-CV-3492, 1995 WL 555868, at \*3 (E.D. Pa. Sept. 14, 1995) (document already in plaintiff's possession so failure to disclose was harmless); *Nguyen*, 162 F.R.D. at 682 (nondisclosure harmless where facts otherwise supplied); *Eppler v. Ciba-Geigy Corp.*, 860 F. Supp. 1391, 1396 (W.D. Mo. 1994) (striking only those witnesses that were neither identified in interrogatory answers nor mentioned in depositions).

497. No. 92 C 6841, 1994 WL 275038 (N.D. Ill. June 20, 1994).

498. *Id.* at \*1.

499. 167 F.R.D. 668 (D.N.J. 1996).

500. *Id.* at 673.

501. *Id.*

502. *See, e.g., Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156 (3d Cir. 1995) (plaintiff denied receiving defendant's disclosures, but admitted receiving letter allegedly transmitting them; plaintiff should have sought missing information; no prejudice to plaintiff); *Harvey v. District of Columbia*, 949 F. Supp. 874, 877 (D.D.C. 1996) (defendants should not have waited until day before discovery closed to complain of inadequacy of expert's report).

503. *See, e.g., Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1351-52 (D.N.M. 1995) (expert opinion in affidavit supporting summary judgment motion that was not previously disclosed was harmless because court denied summary judgment).

504. *Orjias v. Stevenson*, 31 F.3d 995, 1005 (10th Cir.), *cert. denied sub nom. Louisiana-Pacific Corp. v. Orjias*, 513 U.S. 1000 (1994).

505. *Id.*

vague and amorphous, however, that litigants cannot reasonably rely on it to shelter them from sanctions under Rule 37(c)(1).

#### IV. EXPERT WITNESSES AND CONFLICTS OF INTEREST

Parties may consult with numerous experts before settling on one who will testify at trial. Those communications are sometimes sensitive and significant, as counsel may have to share their opinion work product or divulge confidential information in order to judge an expert's suitability. Of course, a party may also hire consulting experts unbeknownst to its adversary. What happens, then, if a party communicates with an expert who has obtained confidential information from an adversary, but who has not been retained by the adversary? What happens if an expert with confidential information allegedly "switches sides" and can actually or potentially use that confidential information to the first party's detriment?

Conflicts of interest involving expert witnesses are an increasing problem in civil litigation. Expert conflicts may severely prejudice both parties in the case. A party who shares confidential information with an expert only to see that expert join the other side is surely threatened by the exposure of key evidence or the possible waiver of opinion work product protection. The party who obtains its adversaries' confidences may see its key expert disqualified.<sup>506</sup> Worse still, the discovering party's attorneys may be disqualified,<sup>507</sup> and the attorneys may further be subject to professional discipline.<sup>508</sup>

---

506. See, e.g., *Koch Refining Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178, 1181-82 (5th Cir. 1996); *Cordy v. Sherwin-Williams, Co.*, 156 F.R.D. 575, 582-83 (D.N.J. 1994); *W.R. Grace & Co. v. Gracecare, Inc.*, 152 F.R.D. 61 (D. Md. 1993); *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1248-50 (E.D. Va. 1991).

507. See, e.g., *Cordy*, 156 F.R.D. at 583-84.

508. See *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996) (discussing ethical violations resulting from improper expert communications and engagement). Rule 26(b)(4)(A) specifically provides for the discovery of trial experts. See FED. R. CIV. P. 26(b)(4)(A). Rule 26(b)(4)(B) provides that a party may discover facts known or opinions held "by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness" at trial only as provided in Rule 35(b) or upon a showing of "exceptional circumstances." FED. R. CIV. P. 26(b)(4)(B). Rule 3.4(c) of the American Bar Association's *Model Rules of Professional Conduct* states that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(c) (1996). Attorneys who knowingly discover facts known or opinions held by opponents' trial or consulting experts other than as provided in Rule 26 violate Model Rule 3.4(c), thereby exposing themselves to professional discipline. See ABA Committee on Ethics and Professional Responsibility, Formal Op. 378 (1993).

Federal courts have the inherent power to disqualify expert witnesses,<sup>509</sup> although instances of disqualification are rare.<sup>510</sup> In determining whether an expert witness should be disqualified, courts generally apply a two part test. First, was it objectively reasonable for the party claiming to have retained the expert to conclude that a confidential relationship existed? Second, did that party disclose confidential information to the expert?<sup>511</sup> Only if the answers to both questions are affirmative should the witness be disqualified.<sup>512</sup> In other words, if the party crying foul should not have reasonably believed that it shared a confidential relationship with the expert, the expert should not be disqualified.<sup>513</sup> If no confidences were disclosed the expert should not be disqualified.<sup>514</sup> "Confidences" must be something akin to attorney-client privileged communications or opinion work product; "technical information" is not confidential for disqualification purposes.<sup>515</sup>

*Cordy v. Sherwin-Williams Co.*<sup>516</sup> is illustrative. The plaintiff in *Cordy* was injured when he rode his bicycle over some railroad tracks. Sherwin-Williams owned the railroad crossing. Plaintiff's counsel communicated with an engineer, James Green, concerning his availability as an expert witness.<sup>517</sup> Plaintiff's counsel spoke with Green over the telephone roughly ten times; Green and plaintiff's counsel entered into a retainer agreement; plaintiff's counsel paid Green a \$3,000 retainer; plaintiff's counsel provided Green with a three-ring binder containing counsel's investigative materials; and Green rendered at least

---

(discussing *ex parte* communications with expert witnesses).

509. *Koch Refining*, 85 F.3d at 1181; *Wyatt v. Hanan*, 871 F. Supp. 415, 419 (M.D. Ala. 1994); *English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498, 1501 (D. Colo. 1993).

510. *Koch Refining*, 85 F.3d at 1181.

511. *Id.*; *Wyatt*, 871 F. Supp. at 419; *Wang Labs.*, 762 F. Supp. at 1248; *Mayer v. Dell*, 139 F.R.D. 1, 3 (D.D.C. 1991); *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334, 337-39 (N.D. Ill. 1990).

512. *Koch Refining*, 85 F.3d at 1181.

513. *See, e.g., Wyatt*, 871 F. Supp. 419-20; *Mayer*, 139 F.R.D. at 3; *Great Lakes*, 734 F. Supp. at 338-39; *Nikkal Indus., Ltd. v. Salton, Inc.*, 689 F. Supp. 187, 191-92 (S.D.N.Y. 1988).

514. *See, e.g., In re Ambassador Group, Inc., Litig.*, 879 F. Supp. 237, 243-46 (E.D.N.Y. 1994); *Wyatt*, 871 F. Supp. at 421; *English Feedlot*, 833 F. Supp. at 1502-03; *Mayer*, 139 F.R.D. at 4; *Great Lakes*, 734 F. Supp. at 339; *Nikkal Industries*, 689 F. Supp. at 191-92; *Paul v. Rawlings Sporting Goods Co.*, 123 F.R.D. 271, 280 (S.D. Ohio 1988).

515. *Nikkal Industries*, 689 F. Supp. at 191-92.

516. 156 F.R.D. 575 (D.N.J. 1994).

517. *Id.* at 576.

one oral opinion.<sup>518</sup> Green never provided a written report. Green subsequently resigned as plaintiff's expert and returned the retainer.<sup>519</sup>

Sometime thereafter, a Sherwin-Williams attorney, Barbara Davis, called Green. During their initial conversation, Green revealed that he had been consulted by plaintiff's counsel.<sup>520</sup> There was some debate about whether Green told Davis of the oral opinion he gave plaintiff's counsel.<sup>521</sup> Green later sent Davis a retainer agreement, which she signed on behalf of her law firm. Davis then sent Green an engagement letter instructing him not to disclose to the defense any information that he either received from or provided to plaintiff's counsel.<sup>522</sup> Green ultimately furnished Davis with a written report reflecting his opinion that the plaintiff's accident was caused by a defect in the bicycle and not by the railroad crossing.<sup>523</sup> There was no evidence that Green ever imparted to Davis any of the information he obtained from plaintiff's counsel.<sup>524</sup>

The *Cordy* court easily concluded that plaintiff's counsel reasonably assumed that he shared a confidential relationship with Green. Many of the materials included in the three-ring binder that plaintiff's counsel sent to Green were not subject to disclosure, and Green acknowledged that plaintiff's counsel told him plaintiff's theory of the case and identified the defendants plaintiff was targeting.<sup>525</sup> The evidence of a confidential relationship was "overwhelming."<sup>526</sup> It was simply impossible for Green to ignore that which he learned from plaintiff's counsel.<sup>527</sup>

Having disqualified Green, the court went on to disqualify defense counsel. Defense counsel did nothing to discover the real nature of the relationship between Green and plaintiff's counsel.<sup>528</sup> At the very least, defense counsel should have communicated with plaintiff's counsel to ascertain the nature of plaintiff counsel's relationship with Green before hiring him.<sup>529</sup> Whether Davis or her firm chose to ignore warning signs or actually encourage Green's misconduct was not a question that the court needed to answer. Either way, defense counsel's conduct was "wanting."<sup>530</sup>

---

518. *Id.* at 577.

519. *Id.*

520. *Id.* at 578.

521. *Id.*

522. *Id.*

523. *Id.* at 579.

524. *Id.*

525. *Id.* at 581.

526. *Id.* at 582.

527. *Id.*

528. *Id.*

529. *Id.* at 584.

530. *Id.*

Expert conflicts are not exclusively a federal issue; state courts are also called upon to resolve expert conflicts and disqualification issues.<sup>531</sup> In *Shadow Traffic Network v. Superior Court*,<sup>532</sup> for example, a California court disqualified the defendant's law firm based on its engagement of experts consulted, but not retained, by the plaintiff. The *Shadow Traffic* court employed the standard two-step analysis to determine whether the defendant's law firm should be disqualified.<sup>533</sup> The court was not called upon to decide the experts' disqualification, for they voluntarily withdrew from the case.<sup>534</sup>

Defense counsel argued that because plaintiff's counsel chose not to retain the experts, their communications could not be deemed confidential as a matter of law.<sup>535</sup> The *Shadow Traffic* court disagreed. The court concluded that "communications made to a potential expert in a retention interview can be considered confidential and therefore subject to protection from subsequent disclosure so long as there was a reasonable expectation of such confidentiality."<sup>536</sup>

It is common for opposing experts in narrow fields of specialty to know one another, to be familiar with each others' work, and perhaps even to have worked together.<sup>537</sup> Many experts are intellectually curious sorts who do not hesitate to call a colleague to inquire about a theory, to question data reported in an article, to discuss new methodologies or studies, or to simply "pick the brain" of the other expert. This is especially true where the experts share a personal relationship forged through service or involvement in professional associations. What if one party's expert consults with the opponent's experts? Must the inquiring expert be disqualified? That was the issue in *Palmer v. Ozbek*.<sup>538</sup>

In *Palmer*, the defendants' expert, Dr. McCay Vernon, consulted with two of the plaintiffs' experts for approximately two hours. That single two-hour meeting was Dr. Vernon's only contact with the plaintiffs' experts.<sup>539</sup> Plaintiffs' counsel never communicated with Dr. Vernon, nor did they form a confidential or fiduciary relationship with Dr. Vernon.<sup>540</sup> The plaintiffs' experts did not

531. See, e.g., *Graham v. Gielchinsky*, 599 A.2d 149 (N.J. 1991) (absent exceptional circumstances, courts cannot permit expert originally consulted by adversary to testify).

532. 29 Cal. Rptr. 2d 693 (Ct. App. 1994).

533. *Id.* at 699-705.

534. *Id.* at 695.

535. *Id.* at 699.

536. *Id.* at 700.

537. See *Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334, 339 (N.D. Ill. 1990).

538. 144 F.R.D. 66 (D. Md. 1992).

539. *Id.* at 67.

540. *Id.*

disclose any trial strategies or confidences to Dr. Palmer at their meeting; the only information disclosed to Dr. Vernon was information that the defendants were entitled to routinely discover under Rule 26.<sup>541</sup> Accordingly, the *Palmer* court easily concluded that Dr. Vernon should not be disqualified and denied the plaintiffs' motion.<sup>542</sup>

Litigants can waive their claims of confidential relationships with their expert witnesses by their silence or by way of inconsistent conduct. In *English Feedlot, Inc. v. Norden Laboratories, Inc.*,<sup>543</sup> defendant SmithKline Beecham (SmithKline) tried to disqualify plaintiff English Feedlot's expert witness, Dr. Ned Brown, and English Feedlot's counsel, Holland & Hart. SmithKline had retained Dr. Brown as a veterinary consultant in 1984 to investigate the potential contamination of its cattle vaccines.<sup>544</sup> In 1985-86, and again in 1989-91, Dr. Brown consulted with and served as an expert for various SmithKline customers who alleged that the defendant's vaccines were defective.<sup>545</sup> Suffice it to say that Dr. Brown shared the customers' view of SmithKline's vaccines.

Between his initial engagement by SmithKline and his subsequent engagements by SmithKline's adversaries, "Dr. Brown repeatedly made his opinions known through published papers, speeches and in conversations with various veterinarians in SmithKline's presence."<sup>546</sup> At no time prior to filing its motion for disqualification did SmithKline ever object to Dr. Brown's dissemination of information on confidentiality grounds.<sup>547</sup> SmithKline essentially acquiesced to Dr. Brown's criticism of the company's products.

The *English Feedlot* court concluded that Dr. Brown and SmithKline shared a confidential relationship,<sup>548</sup> but noted that SmithKline did not divulge any confidential information to him.<sup>549</sup> Even assuming that SmithKline had disclosed confidential information to Dr. Brown, the company waived any claims of confidentiality.<sup>550</sup>

Waiver is the intentional relinquishment of a known right or privilege. *In re Blinder Robinson & Co., Inc.*, 123 B.R. 900 (Bankr. D. Colo. 1991), *citing*, *Department of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984). "A waiver may be explicit, . . . ; or it may be implied, as, for example, when a party engages in conduct which manifests an intent to relinquish the right . . . ,

---

541. *Id.* at 67-68.

542. *Id.* at 68.

543. 833 F. Supp. 1498, 1502 (D. Colo. 1993).

544. *Id.* at 1501-03.

545. *Id.* at 1504.

546. *Id.*

547. *Id.*

548. *Id.* at 1502.

549. *Id.* at 1502-03.

550. *Id.* at 1504.

or acts inconsistently with its assertion." *Id.* Here, SmithKline repeatedly acquiesced to Brown's public criticism of its products. It is thus inconsistent, after impliedly relinquishing this right for SmithKline to now assert that [the] information [it gave to Brown] is confidential. Therefore, assuming arguendo SmithKline disclose[d] confidential information to Brown, SmithKline waived its right to assert confidentiality at this late date.<sup>551</sup>

The court thus denied the defendant's motion to disqualify Dr. Brown.<sup>552</sup>

The *English Feedlot* court further declined to disqualify Holland & Hart based on Dr. Brown's engagement as an expert. Because SmithKline did not divulge confidences to Dr. Brown, Holland & Hart was not "tainted" by its relationship with him. "Simply put, there [was] no 'taint' to transfer."<sup>553</sup>

The fact that *English Feedlot* involved so obvious and so public a waiver should not be taken to mean that lesser conduct does not operate as a waiver. To the contrary, conduct much more likely to be deemed a waiver is easy to anticipate or identify. For example, a party might allow its consulting expert to speak with its trial expert in order to help the trial expert form or shape his opinions. Assuming confidential information passes from the consulting expert to the trial expert, the party has surely waived any confidentiality claims that might otherwise attend its relationship with the consultant or information given to him. If a consulting expert's work forms in whole or part the foundation for a trial expert's testimony and the sponsoring party does not object to related deposition questions posed to the trial expert, the party should be deemed to have waived any confidence arguments.

Courts should be reluctant to disqualify expert witnesses.<sup>554</sup> Such reluctance has one foot in policy<sup>555</sup> and one in practice.<sup>556</sup> As a matter of policy, courts must balance competing objectives, an approach first announced in *Paul v. Rawlings Sporting Goods Co.*<sup>557</sup> Courts following *Paul* balance (1) the need to protect opinion work product and client confidences, and maintain the integrity of the judicial process, with (2) the need to ensure that parties have

---

551. *Id.*

552. *Id.* at 1507.

553. *Id.* at 1505.

554. See *W.R. Grace & Co. v. Gracecare, Inc.*, 152 F.R.D. 61, 64 (D. Md. 1993).

555. See *Koch Refining Co. v. Jennifer L. Boudreaux MV*, 85 F.3d 1178, 1181 (5th Cir. 1996) (noting that some courts consider a third element of "public interest" in addition to the two-party confidentiality test when weighing expert disqualification, and citing cases).

556. See *Wyatt v. Hanan*, 871 F. Supp. 415, 421 (M.D. Ala. 1994) (observing that party claiming confidential relationship can take steps to protect its confidences); *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1250 (E.D. Va. 1991) (discussing steps that can be taken to avoid the disclosure of confidences).

557. 123 F.R.D. 271 (S.D. Ohio 1988).

access to qualified expert witnesses who possess useful specialized knowledge.<sup>558</sup> In conjunction with both elements, courts must be mindful that if experts are too easily disqualified, unscrupulous attorneys and parties will be encouraged to race to create inexpensive relationships with potentially unfavorable experts in order to conflict them out of cases.<sup>559</sup> Such behavior threatens the integrity of the judicial process by depriving courts of the benefit of experts' knowledge and insight, and it deprives parties of the necessary assistance of qualified expert witnesses.<sup>560</sup>

From a practical standpoint, courts should rarely disqualify experts because lawyers seeking to invoke confidentiality have the knowledge, experience and ability to avoid conflicts; thus, they rightfully bear the consequences for failing to take appropriate precautions.<sup>561</sup> A lawyer seeking to retain an expert and establish a confidential relationship should make clear his intention to do so, preferably confirming the engagement in writing.<sup>562</sup> The lawyer should include in the engagement letter an explanation of the expert's confidentiality obligation.<sup>563</sup> Work product communications should be prominently

558. See, e.g., *Wyatt*, 871 F. Supp. at 422; *English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498, 1504-05 (D. Colo. 1993). The *Paul* court wrote:

I recognize that any decision in this area has the potential to affect the way in which attorneys and expert witnesses typically handle their affairs. I believe that the ability of an attorney to communicate effectively with an expert witness either for the purpose of determining whether the expert wishes to be employed, or for the purpose of obtaining the expert's advice, is a matter deserving of court protection. There may well be cases in which the attorney-expert relationship with respect to a particular litigated matter is so strongly established through proof of the existence of a formal and well-defined relationship, and through proof of substantial work performed by the expert relating to the case, that no testimony as to the nature of the communications between the two is necessary in order for the court to conclude that, in all fairness, the expert should not serve in any capacity for the opposing side. Just as clearly, there are cases where the contact between the attorney and expert is so minimal that to prevent the expert from serving for the opposing side would be an injustice both to the opposing party and to the expert.

*Paul*, 123 F.R.D. at 281.

559. See *Paul*, 123 F.R.D. at 281-82.

560. Anecdotal evidence suggests that, in fact, this practice is disturbingly common and widespread. Attorneys who engage in this practice, however, do so at considerable peril. Such conduct may be grounds for draconian sanctions and professional discipline. See, e.g., *Erickson v. Newmar Corp.*, 87 F.3d 298 (9th Cir. 1996).

561. *Wyatt*, 871 F. Supp. at 421.

562. *Wang Labs., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246, 1250 (E.D. Va. 1991); *English Feedlot*, 833 F. Supp. at 1505.

563. *Wang*, 762 F. Supp. at 1250; *English Feedlot*, 833 F. Supp. at 1505.



identified.<sup>564</sup> Counsel seeking to retain an expert should specifically inquire into the expert's past employment in order to ferret out potential problems.<sup>565</sup>

Experts must also be careful to avoid conduct that contributes to a lack of understanding about the consultant's relationship with counsel and the employing party.<sup>566</sup> An expert who may wish to decline employment should express his doubts clearly and unequivocally.<sup>567</sup> An expert who does not want to share a confidential relationship with a prospective employer should decline the engagement.<sup>568</sup> An expert who does not wish to be employed or at least doubts his desire for the employment, or who does not want to be obligated to maintain client confidences, should decline to accept information or materials from the party courting him.<sup>569</sup>

In a conflict of interest twist, experts who are retained to testify at trial, and who are so disclosed and subjected to discovery under Rules 26(a)(2) and (b)(4)(B), may change their opinions to favor the opponent. Such a change of heart often results from new information provided to the expert. The issue then becomes whether the sponsoring party can withdraw its designation and foreclose the expert's testimony, or whether the surprised but obviously delighted opponent can subpoena the expert to testify at trial on its behalf. Moreover, if the opponent calls the expert at trial, can counsel elicit testimony from the expert that he was originally retained by the first party? An expert's admission that he was originally engaged by the party against whom he testifies is potentially devastating.<sup>570</sup>

It is difficult to predict how courts will respond in such situations, for there is little precedent. The court in *Peterson v. Willie*<sup>571</sup> held that the defendant could call an expert originally retained by the plaintiff who sided with the defendant at his deposition.<sup>572</sup> The *Peterson* court further held, however, that the district court erred by allowing the defendant to elicit testimony from the expert

564. *Wang*, 762 F. Supp. at 1250. *But cf.* *Ledgin v. Blue Cross & Blue Shield of K.C.*, 166 F.R.D. 496, 499 (D. Kan. 1996) (court was unpersuaded by phrase "Attorney Work Product" stamped on subject document, calling it "a self-serving embellishment").

565. *Wang*, 762 F. Supp. at 1250; *English Feedlot*, 833 F. Supp. at 1505.

566. *Wang*, 762 F. Supp. at 1250.

567. *Id.*

568. *English Feedlot*, 833 F. Supp. at 1505.

569. *Wang*, 762 F. Supp. at 1250.

570. See 8 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2032, at 447 (1994) (describing such evidence as "explosive").

571. 81 F.3d 1033 (11th Cir. 1996).

572. *Id.* at 1036-38.

that he was initially employed by the plaintiff.<sup>573</sup> The *Rubel v. Eli Lilly & Co.*<sup>574</sup> court declined to allow the plaintiff in a personal injury case to call the doctor who examined her for the defendant, but whom the defendant did not identify as an expert. The *Rubel* court concluded that the plaintiff should not be allowed to call the defendant's doctor as her witness because his testimony would be cumulative;<sup>575</sup> that is, it would overlap with the plaintiff's experts' testimony.<sup>576</sup> Furthermore, the doctor's testimony would unfairly prejudice the defendant under Rule 403.<sup>577</sup>

An apparent key factor in determining whether a party should be allowed to compel the testimony of its opponent's former expert is the availability to the moving party of other expert witnesses on the same subject.<sup>578</sup> Courts are unlikely to compel an adversary's former expert to testify where the party seeking to compel the expert's testimony has other experts available.<sup>579</sup> In such a situation, the party seeking to compel the testimony cannot claim unfair prejudice if the court precludes the expert's testimony. If a court compels the testimony of a party's former expert, it should not allow the jury to hear that the expert was once employed by the party against whom he is testifying.<sup>580</sup> Such evidence is substantially more prejudicial than probative. Additionally, jurors might unfairly conclude that counsel for the party who first employed the expert suppressed evidence that he was obligated to disclose by not calling the expert, thus destroying the attorney's credibility.<sup>581</sup>

---

573. *Id.* at 1038 (further holding such error to be harmless on the particular facts of the case).

574. 160 F.R.D. 458 (S.D.N.Y. 1995).

575. *Id.* at 460-61.

576. *Id.* at 460.

577. *Id.* at 461-62.

578. *See id.* at 460-61; *Durflinger v. Artilles*, 727 F.2d 888, 891 (10th Cir. 1984).

579. *See, e.g., Rubel*, 160 F.R.D. at 460-61; *Durflinger*, 727 F.2d at 891.

580. Unless, of course, the attorney who initially employed the expert cross-examines the expert on his qualifications. An attack on the expert's qualifications surely lends great probative value to the fact that the cross-examining attorney who now appears so skeptical or critical once employed the expert in the same case. In that situation, the party compelling the expert's testimony should be allowed elicit the expert's prior employment by the opponent on re-direct examination. *But see Steele v. Seglie*, Civ. A. No. 84-2200, 1986 WL 30765, at \*5 (D. Kan. Mar. 27, 1986) (holding that such rehabilitation is improper because of prejudice to party initially retaining the expert; Federal Rule of Evidence 403 prevents such rehabilitation).

581. *Granger v. Wisner*, 656 P.2d 1238, 1242 (Ariz. 1982).

## V. EXPERT WITNESS FEES

Most trial lawyers have, at one time or another, been shocked or angered by the fees experts propose to charge for their services. Expert witnesses' fees are often exorbitant.<sup>582</sup> Experts frequently demand minimum deposition fees far exceeding that which they would earn were they to charge their regular hourly rate for the actual deposition time. Experts may charge the party deposing them an hourly rate exceeding that which they charge the party employing them.<sup>583</sup> Treating physicians may charge expert witness fees far above their regular charges to their patients, a practice roundly criticized by reviewing courts.<sup>584</sup>

Federal courts have long recognized the problems posed by experts' abusive fee demands,<sup>585</sup> as have state courts.<sup>586</sup> Expert witness fees concern many courts.<sup>587</sup> As the *Dominguez v. Syntex Laboratories, Inc.*<sup>588</sup> court lamented: "Apparently the litigious nature of society has caused litigation participants to forget the adage 'an honest day's work for an honest day's pay.'"<sup>589</sup> Fortunately for "sticker-shocked counsel and their beleaguered clients," expert witness fees are subject to judicial regulation.<sup>590</sup>

Federal Rule of Civil Procedure 26(b)(4)(C)(i) provides that absent manifest injustice, "the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent responding to discovery."<sup>591</sup> The rule seeks to

582. See James A. Mellowitz, *Whatever the Market Will Bear: Fighting Exorbitant Expert Fees*, FOR THE DEF., Mar. 1995, at 2, 2 (giving examples of exorbitant fees).

583. Courts disapprove of experts favoring one party over another when charging their time. See, e.g., *Jochims v. Isuzu Motors, Ltd.*, 141 F.R.D. 493, 496-97 (S.D. Iowa 1992) (refusing to allow plaintiff's expert to charge the defendant twice the hourly fee charged the plaintiff); *Draper v. Red Devil, Inc.*, 114 F.R.D. 46, 48 (E.D. Ark. 1987) (refusing to allow plaintiff's expert to charge the defendant \$10 per hour more than he charged the plaintiff).

584. See, e.g., *Hose v. Chicago & N.W. Transp. Co.*, 154 F.R.D. 222, 224-27 (S.D. Iowa 1994); *Pierce v. Nelson*, 509 N.W.2d 471, 474-75 (Iowa 1993); *Kirby v. Ahmad*, 635 N.E.2d 98, 99 (Ohio Misc. 1994).

585. See, e.g., *Cotton v. Consolidation Coal Co.*, 457 F.2d 641, 646 (6th Cir. 1972) (slashing expert's fee for short deposition).

586. See, e.g., *State v. Lots Nos. 133, 134 and 135*, 238 A.2d 837, 838-39 (Del. 1968) (affirming trial court's limitation of expert's fee).

587. See, e.g., *Jochims*, 141 F.R.D. at 497 ("Continuing escalation of expert witness fees . . . is of great concern. The escalating cost of civil litigation runs the grave risk of placing redress in the federal courts beyond the reach of all but the most affluent.").

588. 149 F.R.D. 166 (S.D. Ind. 1993).

589. *Id.* at 169.

590. Mellowitz, *supra* note 582, at 2.

591. FED. R. CIV. P. 26(b)(4)(C)(i).

regulate expert witnesses' fees so that plaintiffs will not be hampered in their efforts to hire qualified experts, while defendants will not be burdened with unreasonably high fees preventing feasible discovery.<sup>592</sup> The goal of Rule 26(b)(4)(C) is to fairly compensate experts for their time spent participating in litigation, while preventing one party from unfairly obtaining the benefit of the work of the opposing party's expert without paying for it.<sup>593</sup> Courts called upon to make decisions "in this entropic field must be fair to the parties, equitable *vis-a-vis* the witness, and comprehensible to the community at large."<sup>594</sup>

One of the first cases articulating a transferable standard for evaluating the reasonableness of expert witnesses' fees was *Goldwater v. Postmaster General of the United States*.<sup>595</sup> The *Goldwater* court identified six factors to be considered in evaluating the reasonableness of an expert's fee within the meaning of Rule 26(b)(4)(c). These are:

(1) the witness's area of expertise; (2) the education and training that is required to provide the expert insight which is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the cost of living in the particular geographic area; and (6) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.<sup>596</sup>

The weight to be given any one factor in a particular case depends on the circumstances presented to the court.<sup>597</sup>

Consideration of these factors led the *Goldwater* court to reduce the hourly fee for the plaintiff's expert psychiatrist from \$450 to \$200.<sup>598</sup> The court reasoned that an hourly rate of \$200 was consistent with the rates charged by other comparably respected psychiatrists, and that reducing the expert's fees promoted the goal of allowing plaintiffs to hire competent experts without unduly burdening defendants.<sup>599</sup>

The court in *Jochims v. Isuzu Motors, Ltd.*<sup>600</sup> slightly revised the *Goldwater* six-factor test to create a seven-factor test of its own. The *Jochims*' court first eliminated the fifth *Goldwater* factor, the cost of living in a particular geographic

---

592. *Hurst v. United States*, 123 F.R.D. 319, 321 (D.S.D. 1988); *Anthony v. Abbott Labs.*, 106 F.R.D. 461, 465 (D.R.I. 1985).

593. *Hurst*, 123 F.R.D. at 321.

594. *Anthony*, 106 F.R.D. at 465.

595. 136 F.R.D. 337 (D. Conn. 1991).

596. *Id.* at 340.

597. *Id.*

598. *Id.*

599. *Id.*

600. 141 F.R.D. 493 (S.D. Iowa 1992).

area.<sup>601</sup> The *Jochims* court reasoned that the cost of living in a particular geographic area is directly relevant to the reasonableness of an expert's fee and, in any event, this factor is calibrated (at least indirectly) into prevailing market rates.<sup>602</sup> The *Jochims* court then added two factors: (1) the fee actually being charged to the party who retained the expert; and (2) the fee the expert traditionally charges on related matters.<sup>603</sup>

The issue in *Jochims* was the fee the plaintiff's engineering expert, Dr. Andrej Nalecz, proposed to charge the defendant for his deposition. Dr. Nalecz was charging the plaintiff between \$150 and \$250 per hour, depending on the type of activity and when it was performed.<sup>604</sup> He proposed to charge the defendant \$500 per hour for his deposition, contending that his deposition was critically important; that it would be highly technical; that it would be stressful; and that it would require thoughtful preparation.<sup>605</sup>

The court's consideration of its seven-factor test led it to the "inescapable conclusion" that Dr. Nalecz's \$500 per hour deposition charge was "grossly excessive,"<sup>606</sup> as well as "unconscionable" and "astronomical."<sup>607</sup> Again applying its seven-factor test, the *Jochims* court concluded that \$250 per hour, the highest rate he charged the plaintiff, was the "outer limit" of a reasonable fee for Dr. Nalecz's deposition time.<sup>608</sup>

Other courts have adopted the *Jochims* seven-factor analysis.<sup>609</sup> Again, those seven factors are:

(1) the witness's area of expertise; (2) the education and training that is required to provide the expert insight which is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the fee actually being charged to the party who retained the expert; (6) the fee the expert traditionally charged on related matters; and (7) any other factor likely to be of assistance to the court in balancing the interests implicated by Rule 26.<sup>610</sup>

---

601. *Id.* at 496.

602. *Id.*

603. *Id.*

604. *Id.* at 494.

605. *Id.*

606. *Id.* at 496.

607. *Id.* (quoting *Anthony v. Abbott Labs.*, 106 F.R.D. 461, 464-65 (D.R.I. 1985)).

608. *Id.* at 497.

609. *See, e.g., Dominguez v. Syntex Labs., Inc.*, 149 F.R.D. 158, 165 (S.D. Ind. 1993); *Pierce v. Nelson*, 509 N.W.2d 471, 474-75 (Iowa 1993); *Kilsheimer v. Dewberry & Davis*, 665 A.2d 723, 735-37 (Md. Ct. Spec. App. 1995), *cert. denied*, 671 A.2d 20 (Md. 1996).

610. *See Jochims v. Isuzu Motors, Ltd.*, 141 F.R.D. 493, 495-96 (S.D. Iowa 1992).

State courts have also gotten into the act. The issue in *State ex rel. Lichtor v. Clark*<sup>611</sup> was the amount to be paid the defendant's desired medical expert, Dr. Joseph Lichtor. Missouri has a rule similar to Federal Rule 26(b)(4)(c),<sup>612</sup> but given the procedural posture of the case, the appellate court instead looked to the trial court's inherent authority to impose reasonable conditions on the exercise of discovery and to its authority granted by rule to design protective orders.<sup>613</sup> The trial court had ordered that the plaintiff pay Dr. Lichtor \$85 per hour for his deposition time, far lower than the \$300 per hour on which the defendant had insisted.<sup>614</sup> Although noting that the trial court's hourly rate was "on the low side," the *Clark* court nonetheless affirmed the trial court's determination.<sup>615</sup> The court reasoned:

It is necessary for the protection of Dr. Lichtor that the hourly rate of compensation be at such a level that neither party is particularly able to use the monetary aspect as a lever to burden or harass the other party during this discovery. If no fee is provided, or if the hourly rate is too low, plaintiff could unduly extend the questioning of Dr. Lichtor. If the hourly rate is too high, Dr. Lichtor or defendant casualty could attempt to prolong the questioning. While the hourly rate of \$85.00 allowed Dr. Lichtor is on the low side, it would seem to be high enough to discourage plaintiff from unduly prolonging the deposition . . . .<sup>616</sup>

The question is not whether courts *can* regulate the fees that expert witnesses charge, but *should* they regulate experts' fees? The answer is yes. Experts clearly are entitled to reasonable fees, but an opposing party also is entitled to reasonable discovery. Outrageous expert witness fees which make deposition costs prohibitive and otherwise discourage discovery threaten the fairness which should characterize modern litigation practice.

Perhaps no court has better expressed the need to control expert fees than did Judge Selya in his entertaining opinion in *Anthony v. Abbott Laboratories*.<sup>617</sup> In *Anthony*, the defendant noticed the deposition of Dr. Paul Stolley, a medical school professor and one of the plaintiff's key experts. The defendant balked at

---

611. 845 S.W.2d 55 (Mo. Ct. App. 1992).

612. See Mo. R. Civ. P. 56.01(b)(4)(b) ("A party may discover by deposition the facts and opinions to which the expert is expected to testify. Unless manifest injustice would result, the court shall require that the party seeking discovery from an expert pay the expert a reasonable hourly fee for the time such expert is deposed.").

613. *Clark*, 845 S.W.2d at 67.

614. *Id.* at 58-59.

615. *Id.* at 68.

616. *Id.*

617. 106 F.R.D. 461 (D.R.I. 1985).

paying Dr. Stolley's hourly rate of \$420.<sup>618</sup> In reducing Dr. Stolley's hourly rate to an "extremely munificent" \$250,<sup>619</sup> Judge Selya wrote:

For a person with little or no discernible overhead, a rate of \$420 hourly strikes this court as unconscionable. Based on a standard (40 hour) work week, annualization would produce an income to Stolley of \$840,000 yearly. He may well be a genius in his field, but this court cannot find that even so important and prestigious a profession as medicine has a right to command such exorbitant rewards . . . . There must be some reasonable relationship between the services rendered and the remuneration [sic] to which an expert is entitled; and Stolley's all-that-the-traffic-will-bear approach falls well outside the outer limits of the universe of rationally-supportable awards.

To be sure, we live in an age where a grown man may be paid a seven figure annual salary to dribble a small round ball. But, the forces of the marketplace are at work in such a situation: not only supply and demand, but the variegated effects of the superstar's presence on attendance, television revenues, and the all-hallowed won/lost record. And, most important, the employer and the employee square off and bargain at arm's length in order to determine an equitable stipend, each with something to lose and something to gain. In the Rule 26(b)(4)(c) context, however, such factors are noticeably absent; the plaintiffs have handpicked the expert, and the defense has neither options nor bargaining power if it desires to obtain the pretrial discovery which the rule permits. Unless the courts patrol the battlefield to ensure fairness, the circumstances invite extortionate fee-setting.<sup>620</sup>

The *Anthony* court concluded:

Our citizens' access to justice, which is at the core of our constitutional system of government, is under serious siege. Obtaining justice in this modern era costs too much. The courts are among our most treasured institutions. And, if they are to remain strong and viable, they cannot sit idly by in the face of attempts to loot the system. To be sure, expert witness fees are but the tip of an immense iceberg. But, the skyrocketing costs of litigation have not sprung full-blown from nowhere. Those costs are made up of bits and pieces, and relaxation of standards of fairness threatens further escalation across the board. The effective administration of justice depends, in significant part, on the maintenance and enforcement of a reasoned cost/benefit vigil by the judiciary.<sup>621</sup>

---

618. *Id.* at 462-63.

619. *Id.* at 465.

620. *Id.* at 464-65.

621. *Id.* at 465.

The time has come for courts to rein in expert witness fees.<sup>622</sup> Regardless of whether a court relies on Rule 26, a state equivalent, or its inherent power to control discovery, it should analyze the reasonableness of expert witnesses' fees as outlined in *Jochims v. Isuzu Motors, Ltd.*<sup>623</sup> The *Jochims* seven-factor test best ensures fairness to both experts and litigants.

## VI. CONCLUSION

Expert witnesses play a prominent role in litigation. Many cases boil down to a battle of experts, and professionals from diverse fields and disciplines have transformed service as an expert witness into a cottage industry. There are, of course, positive aspects to expert testimony. Chief among these is the legitimate assistance that experts commonly lend to courts and juries. Experts frequently help courts and juries reach just results that would be impossible to reach without expert testimony. On the other hand, "junk scientists" may mislead courts and juries, prolong litigation and drive up litigation costs.

Apart from the broad policy issues attending the proliferation of expert testimony, both courts and trial lawyers must understand the fundamentals of expert witness practice. Absent such understanding, courts may wrongly admit or exclude expert testimony, thus hurting one party or unfairly enriching another. Trial lawyers must understand the judicial regulation of expert testimony because the failure to do so may prove disastrous. More than one case has been lost because a court excluded expert testimony, and conflicts of interest in the expert witness context may pose a professional threat. Finally, clients' increasing sensitivity to litigation costs may require trial lawyers to combat some expert witnesses' exorbitant fees.

---

622. The judiciary apparently agrees. See, e.g., *Hose v. Chicago & N.W. Transp. Co.*, 154 F.R.D. 222, 227 (S.D. Iowa 1994).

623. 141 F.R.D. 493, 495-96 (S.D. Iowa 1992).



